EDITOR'S NOTE

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85-642-CFX
tus: GRANTED

Title: Conticommocity Services, Inc., Petitioner
v.
William T. Schor and Mortgage Services of America

keted:
ober 16, 1985

Court: United States Court of Appeals for the District of Columbia Circuit

e:
85-621

Counsel for petitioner: Byman, Robert Leslie

Counsel for respondent: Solicitor General

ry	Date	Note	Proceedings and Orders
1	Oct 16 1985	G	Petition for writ of certiorari filed.
2	Nov 19 1985		Brief of respondents in opposition filed. VIDED.
3	Nov 20 1985		DISTRIBUTED. December 6, 1985
4	Dec 9 1985		Petition GRANTED. The case is consolidated with 85-621, and a total of one hour is allotted for oral argument.
			**********
5	Jan 23 1986		Brief of petitioner Conticommodity Services, Inc. filed.
6	Jan 22 1986		Brief of petitioner Commodity Futures Trading Commission filed.
7	Jan 24 1986		Joint appendix filed. VIDED.
8	Feb 7 1986	G	Motion of petitioner ContiCommodity Services, Inc. for divided argument filed.
9	Feb 7 1986	D	Motion of respondents for divided argument filed.
2	Feb 7 1986		Order extending time to file brief of respondent on the merits until March 12, 1986.
3	Feb 24 1986		Motion of petitioner ContiCommodity Services, Inc. for divided argument GRANTED.
4	Feb 24 1986		Motion of respondents for divided argument DENIED. Justice Brennan would grant this motion.
5	Feb 26 1986		Record filed.
6	Feb 26 1986		Certified copy of original record and proceedings (Box) received.
7	Mar 12 1986		Brief of respondents William T. Schor, et al. filed. VIDED.
8	Mar 14 1986		SET FOR ARGUMENT, Tuesday, April 29, 1986. (3rd case)
9	Mar 27 1986		CIRCULATED.
0	Apr 22 1986	X	Reply brief of petitioner Conticommodity Services, Inc. filed. VIDED.
1	Apr 22 1986	X	Reply brief of petitioner Commodity Futures Trading Commission filed. VIDED.
2	Apr 29 1986		ARGUED.

85-642

No.

In the

Supreme Court of the United States

OCTOBER TERM 1985

CONTICOMMODITY SERVICES, INC.

Petitioner,

v.

WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

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October 16, 1985

CHAS. P. YOUNG COMPANY

QUESTION PRESENTED

Whether Article III of the U.S. Constitution prohibits Congress from providing for the adjudication of incidental common law counterclaims as a part of a voluntarily elected reparations procedure designed to provide a forum for the speedy and efficient resolution of controversies arising under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*

PARTIES IN THE PROCEEDING BELOW

Petitioner ContiCommodity Services, Inc. was a respondent in the proceeding below in the United States Court of Appeals for the District of Columbia Circuit. Other respondents were the Commodity Futures Trading Commission and Richard L. Sandor. William T. Schor and Mortgage Services of America were petitioners in the proceeding below.

ContiCommodity Services, Inc. is a Delaware corporation wholly owned by Continental Grain Company, a Delaware corporation, and has the following subsidiaries and/or affiliates: Admiral Advisory Ltd.; ContiCapital Management, Inc.; ContiCommodity Services, AG; ContiCommodity Services (Canada) Ltd.; ContiCommodity Services (Deutschland) GmbH; ContiCommodity Services S.A.; ContiCommodity Services (U.K.) Ltd.; ContiAdvisory Inc.; ContiFund Management Corporation; ContiSecurities Inc.; and T. G. Roddick Co. Ltd.

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CONSTITUTIONAL PROVISIONS

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No.

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ContiCommodity Services, Inc. ("Conti") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals (App. B and E, *infra*) are reported at 740 F.2d 1262 and at 770 F.2d 211.

JURISDICTION

The judgment of the Court of Appeals (App. F, *infra*) was entered on August 13, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant constitutional provisions, statutes and regulations, which are reproduced in full in Appendix I, are Article III, § 1 of the U.S. Constitution, § 14 of the Commodity Exchange Act, 7 U.S.C. § 18, and Regulation 12.23(b)(2) of the Commodity Futures Trading Commission.[1]

STATEMENT OF THE CASE

In order to regulate the growing commodities futures industry and to protect the investing public, Congress revamped the Commodity Exchange Act in 1974 with the adoption of the Commodity Futures Trading Commission Act, 7 U.S.C. § 1 *et seq.* (the "Act"). As an integral part of the Act, Congress created the Commodity Futures Trading Commission (the "Commission") and directed it to adopt regulations to create a reparations process as an additonal dispute resolution forum, to supplement the existing forums of the courts and arbitration. Although not required to pursue a remedy in reparations, the Act allowed a customer of a commodities firm to elect to bring a reparations complaint to redress violations of the Act in a forum designed to provide a speedy and efficient alternative to litigation.

In keeping with Congress's goal of efficient dispute resolution, the Commission promulgated a regulation in 1976 to permit the Commission, once a customer had elected to invoke the reparations procedure, to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2)

[1]The relevant subject matter of Regulation 12.23(b)(2) is now codified, effective April 23, 1984, in Regulation 12.19, 17 C.F.R. § 12.19 (1984). Section 14 of the Commodity Exchange Act is relevant both as it existed at the time of the transactions here and as amended in 1983. The past and present texts of the statute and the regulations are reproduced in Appendix I.

(1983)). Pursuant to its regulations, the Commission has routinely heard counterclaims which involve common law claims such as claims for debit balances in a customer's account.

William T. Schor and Mortgage Services of America (collectively "Schor") maintained commodities futures trading accounts with Conti. Schor incurred significant trading losses, and after the accounts were closed, there remained a deficit balance due Conti of approximately $90,000. (App. B, p. 2–3). Schor and Conti each initially turned to a different forum to assert their respective positions. Conti filed an action to recover the deficit balance in the United States District Court for the Northern District of Illinois; Schor filed a reparations complaint before the Commission seeking $1.8 million in damages for alleged violations of the Act. (App. B, p. 2, 5 n.6).

Schor moved to dismiss Conti's federal court action on the ground that the reparation action was filed first and Conti's action could be asserted as a counterclaim in the reparation proceeding. Although the district court denied Schor's motion, Conti voluntarily dismissed its federal action and filed a counterclaim in reparations, since reparations offered speedier adjudication than could the federal court. (App. B, p. 5, n.6; App. J, p. 1). After a three-day trial, an Administrative Law Judge ("ALJ") ruled against Schor on all counts and in favor of Conti on its counterclaim. (App. B, p. 5).

Schor sought review of the ALJ's decision before the full Commission. After the Commission declined review (App. G), Schor appealed to the United States Court of Appeals for the District of Columbia Circuit, pursuant to § 14(e) of the Act, 7 U.S.C. § 18(e) (1982).

Although the parties had not themselves raised the issue, the Court of Appeals on its own motion directed the parties to address whether Article III of the United States Constitution, as interpreted by this Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)

("*Northern Pipeline*"), permitted adjudication by the Commission of common law counterclaims.

On August 10, 1984, a panel of the Court of Appeals held that the Commission's regulation permitting common law counterclaims is an impermissible extension of congressional authority. Although the statute and legislative history specifically and expressly refer to such counterclaims, the panel overlooked the relevant history and found that Congress had not clearly manifested its intent to authorize Commission adjudication of common law counterclaims:

> Discovering no explicit congressional intention to do so, we conclude that the CEA [the Act] does not authorize the Commission to adjudicate Conti's breach of contract counterclaims. (App. B, p. 12).

The panel declined, therefore, to actually reach the question of whether the Congressional grant of counterclaim authority would violate Article III as construed by *Northern Pipeline*. In so doing, however, the court below did not consider an express reference in the legislative history of the Act in which Congress stated its understanding that the Commission is authorized to hear all counterclaims arising out of the subject matter of disputes in reparations. When the Act was amended in 1983 (after this Court's ruling in *Northern Pipeline*), the House Committee Report reviewed the status and the purpose of counterclaims in connection with an amendment to enhance enforcement provisions:

> [S]ince *the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts*, the bill would create appropriate sanctions against a claimant who has failed to honor a reparations award in favor of the counterclaimant.

H.R. Rep. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904 (emphasis added); *See also* S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982).

When Congress created the reparations remedy in 1974, it intended to provide a forum for efficient and expeditious adjudication of customer claims. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978). In keeping with this purpose, Congress expressly provided in the 1974 amendments that the Commission would have jurisdiction to hear counterclaims brought by a broker against his customer. The Act, as amended in 1974, required a nonresident complainant to post a bond double the amount of his claim to cover costs and attorneys' fees if the respondent prevails and to pay any reparation award entered against the complainant "on any counterclaim." Pub. L. No. 93-463, §106, 88 Stat. 1389 (1974) (codified at 7 U.S.C. §18(d) (1976)).

In its 1974 enactment, Congress did not attempt to enumerate the types of counterclaims which are within the jurisdiction of the Commission. Instead, Congress directed the Commission to adopt appropriate regulations defining its counterclaim jurisdiction. The House Committee on Agriculture, which sponsored the bill, stated in its report:

> Counterclaims will be recognized in the proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

H.R. Rep. No. 975, 93rd Cong., 2d Sess. 23 (1974).

In 1976, the Commission adopted Regulation 12.23(b)(2), which provides:

> an answer may set forth as a counterclaim facts alleging a violation and a request for reparation award that would be a proper subject for a complaint under §12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2) (1983)). In its regulation the Commission borrowed from Rule 13(a) of the Federal Rules of Civil Procedure, which defines a counterclaim as one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a).

In 1983, Congress extended the authorization of the Commission for an additional four years and amended the reparations provisions of the Act by adding a section permitting the Commission to promulgate "such rules, regulations and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section." Pub. L. No. 97–444, § 231(b), 96 Stat. 2319 (1983) (codified at 7 U.S.C. § 18(b) (1982)). Congress concluded that such a grant of broad discretion would enable the Commission to streamline the reparations process. *See* H.R. Rep. No. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904; S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982). The new section expressly authorized the Commission "without limitation" to promulgate rules and regulations concerning "the nature and scope of... counterclaims...." Pub. L. No. 97–444, § 231(b), 96 Stat. 2319 (1982) (codified at 7 U.S.C. § 18(b) (1982)).

The 1983 amendments also provided a new method for enforcing a counterclaim award. The Act, as it existed before the 1983 amendments, penalized a registered broker who failed either to pay a reparations award or to file a timely notice of appeal. Under those circumstances, the Act prohibited the broker from trading on the contract markets and suspended his registration until he complied with the Commission's order. *See* 7 U.S.C. § 18(b) (1976). The prior Act did not, however, penalize a customer who failed to pay a counterclaim award. The 1983 amendments corrected this inequity by providing that any party who fails to pay a reparation award be barred automatically from trading on all contract markets. *See* Pub. L. No. 97-444, § 231(f), 96 Stat. 3219-20 (1983) (to be codified at 7 U.S.C. § 18(b) (1982)).

Despite this legislative history and despite the statement of Congress that "the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts," *supra*, p. 4, the Court of Appeals determined that there was no congressional intention to extend authority to the Commission to hear common law counterclaims. Although this key bit of legislative history was cited to the Court of Appeals (Commission Br., p. 21-22), the court below did not discuss the passage in its analysis.

Similarly, the Court of Appeals disregarded the fact that Schor had opposed Conti's separate federal action on the ground that the action could be brought as a reparations counterclaim. Without discussion of this fact, the Court of Appeals concluded that Schor had not freely consented to the Commission's jurisdiction. (App. B, p. 25).

Conti and the Commission each sought rehearing from the Court of Appeals. Although the petitions failed to receive sufficient votes for rehearing, Judge Wald, with Judge Starr concurring, filed a statement as to why rehearing *en banc* should have been granted:

> In sum, this is, so far as I know, the first major extension of [*Northern Pipeline*] to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas. I believe the case deserves *en banc* consideration. (App. C, p. 3).

Conti and the Commission each petitioned for a writ of certiorari. On July 2, 1985, this court granted the writs, vacated the judgement below, and remanded for further

consideration in light of *Thomas* v. *Union Carbide*, 473 U.S. , 105 S. Ct. 3325 (1985) ("*Thomas*") (App. D). On August 13, 1985 the same panel which had rendered the original judgement reinstated that judgement. (App. E).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision decides a vitally important question of federal law. The impact of the court's opinion reaches far beyond the monetary rights of the individual litigants, since it eviscerates the statutory scheme designed by Congress for dispute resolution in the commodities industry and because it will necessarily impact upon any other attempt by Congress to create similar procedures in other substantive areas. Submission to reparations is a voluntary process to which the litigant must consent. This Court's opinions in *Thomas, Northern Pipeline* and earlier cases establish that the element of consent removes any Article III concerns as to the type of machinery established here by Congress; the Court of Appeals' holding, therefore, is in conflict with this Court's holdings. To the extent that *Thomas* and *Northern Pipeline* did not settle that issue, however, this Court should grant review to settle this important question and to resolve the conflict in principle among the circuits presented by this case.

I. The Issue Presented Is An Important Question Of Federal Law.

In reaching its judgment in the present case, the Court of Appeals opined that Congress cannot permissibly establish a voluntary forum for dispute resolution which includes resolution of related common law counterclaims unless the adjudicatory body is vested with Article III safeguards. In so doing, the District of Columbia Circuit has invalidated an Act of Congress designed to provide a forum for countless past and potential future litigants in an important area of commercial enterprise and has cast an impenetrable barrier upon any attempt by Congress to create similar dispute resolution forums in other areas of commerce and society.

Congress created the reparations remedy with the intention that the process provide aggrieved customers of commodity firms with a voluntary alternative to litigation, which would be less expensive and speedier than litigation. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978). Pursuant to its legislative authority, the Commission adopted regulations to establish a reparations unit to handle these claims through a team of administrative law judges who have special expertise in the unique jargon, technicalities, and mechanics of the commodities industry. Congress further provided that counterclaims arising out of the same commodities transactions be handled as part of the reparations process. Without such a provision, the reparations process would be practically eviscerated. A customer could not be expected to elect his remedy in reparations if the brokerage firm could, and of necessity must, bring a separate federal action for what would otherwise be a reparations counterclaim. Moreover, the existence of compulsory counterclaims, Fed. R. Civ. P. 13(a), could force the customer to counterclaim in any federal action brought by the brokerage house. Thus, without the ability to resolve the entire dispute, and with the virtual certainty that many reparations actions would be accompanied by separate court actions which would require simultaneous litigation of the same issues before two different tribunals, the rights afforded to claimants by Congress would be totally emasculated.

Although the original opinion below (App. B) is carefully crafted to appear that no constitutional question is presented, that result was reached only upon the court's inexplicable failure to address the unambiguous legislative history. There is no question, however, that the Court of Appeals' decision invalidates an act of Congress as surely as if there had been an express holding to that effect. In the minority statement filed by Judge Wald as to *en banc* review, she observed:

> I would hear this case *en banc* because it results in a serious evisceration of a congressionally crafted scheme

for compensating victims of Commodity Futures Trading Act ("CFTA") violations. The reparations provision has, since 1974, provided an administrative forum as an alternative to the courts for such victims to recover their losses. As a practically necessary corollary, it empowers the agency to decide counterclaims arising out of the transactions complained of and affecting the account from which the reparations will be paid. To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense in the fastmoving money world and will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims. The faster and less expensive alternative forum will be decimated. (App. C, p. 2) (emphasis in original).

Moreover, the decision of the Court of Appeals did not articulate whether its holding would be prospective or retroactive. If retroactive (as is apparently the case) all judgments entered on counterclaims in Commission proceedings since the inception of the reparations process are subject to attack for want of subject matter jurisdiction. The Court of Appeals' decision also effectively prevents Congress from dealing in areas other than the commodities industry with alternative dispute resolution outside the context of Article III courts.

Although the Court of Appeals' decision is not technically binding in other circuits, the practical reality of the judgment will prevent the present issue from arising in other circuits so that it might be further refined in the courts of appeals. In the wake of the present judgment, it is unclear whether the Commission will accept common law counterclaims in reparations actions. Even if it were to do so, and even as to cases already pending in the administrative pipeline, however, no prudent litigant, faced with the uncertainty created by the Court of Appeals' decision, would rely upon a reparations counterclaim to enforce its rights. Rather, litigants will of necessity be forced to bring separate

federal actions to pursue the claim they would otherwise have brought as reparation counterclaims.

The Court of Appeals' decision also casts a cloud upon other forms of alternative dispute resolution, ranging from traditional forms of arbitration to the new and innovative methods which are being currently developed in an effort to unclog the overburdened court system. If, under the Court of Appeals' decision, litigants may not permissibly turn to a voluntary congressionally created dispute resolution forum, litigants must also question whether an arbitration award may also be subject to a challenge for subject matter jurisdiction when an attempt is made to enforce the award through the federal courts pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982). Where any doubt exists as to the potential validity of an alternative forum, litigants will be forced to turn instead to the courts.

In one fell swoop, therefore, the decision of the Court of Appeals eviscerates an Act of Congress, deprives future litigants of a speedy and efficient forum for dispute resolution, burdens the federal courts with litigation they would otherwise not be likely to receive, and unleashes serious questions as to perhaps hundreds of judgments which the litigants had long ago assumed were settled. Further, the decision casts a shroud over all other present and future alternative dispute resolution procedures. The instant case undeniably presents an important question of federal law.

II. The Decision Below Is Incorrect.

In reaching its conclusion that common law counterclaims cannot be heard in reparations even with litigant consent, the Court of Appeals looked for but professed to find no guidance in *Northern Pipeline* or elsewhere in this Court's prior decisions in dealing with the litigant consent issue (App. B, p. 24):

> The most we can fairly say of *Northern Pipeline* is that it provides no "determinative principle" for evaluating

> the constitutionality of non-Article III adjudicatory schemes that operate only with the litigants' consent.

If, as the Court of Appeals found, the issue was not adequately settled in *Northern Pipeline*, it certainly was in *Thomas*, when Justice O'Connor stated the holding of *Northern Pipeline*:

> The Court's holding in that case [*Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review.

Thomas, at 105 S. Ct. 3334-35. (Emphasis added). The Court of Appeals ignored this clarifying language on remand. Certiorari should be granted to review the decision of the Court of Appeals.

A. *The Decision Below Is In Conflict With This Court's Prior Holdings.*

Northern Pipeline did not command a majority opinion but was decided with the confluence of a plurality opinion and a concurring opinion. The plurality found that Congress had impermissibly vested bankruptcy courts, which do not enjoy Article III attributes, with jurisdiction over common law claims. The concurring opinion, however, was more narrowly drawn; Justice Rehnquist limited his concurrence by noting that the bankruptcy courts at issue in *Northern Pipeline* did not acquire their jurisdiction with litigant *consent*:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III of the United States Constitution.

Northern Pipeline, 458 U.S. at 91 (emphasis added).

While a single opinion could not command five votes in *Northern Pipeline*, a majority of the justices did agree that the

absence of consent to adjudication by bankruptcy judges was fatal to the Bankruptcy Act and integral to the Court's holding. Justices Rehnquist, O'Connor, White and Powell, together with the Chief Justice, authored or concurred in opinions which referred to the absence of consent as a critical flaw in the Bankruptcy Act. 458 U.S. at 91, 92, 95.

As noted above, the *Thomas* decision unambiguously articulated that consent is a critical element in determining the propriety of adjucations by non-Article III courts.

This Court has consistently upheld the consensual reference of disputes to non-Article III tribunals. In *Heckers* v. *Fowler*, 69 U.S. 123 (1865), the Court upheld the consensual assignment of a trial to a referee. In *Kimberly* v. *Arms*, 129 U.S. 512 (1889), the Court held that, upon the consent of the parties, a master could hear a matter and report findings of fact and law to the judge, who was to treat the findings as presumptively correct. The Court has also consistently held that under the 1898 Bankruptcy Act the parties have the right to consent to have all issues, including state common law claims, resolved by a referee. *See Katchen* v. *Landy*, 382 U.S. 323 (1966); *Cline* v. *Kaplan*, 323 U.S. 97, 98-99 (1944); *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-69 (1932). More recently, the Court has held that parties may consent to arbitration to resolve their disputes. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974).

The cases in which the Court has upheld consent to a non-Article III forum have one common feature. In each case Congress has provided the parties with an alternative—not a substitute—to an Article III court. As long as an Article III judge is available to decide the dispute, the Constitution's requirement of separation of powers has been satisfied.

Under the Commodity Exchange Act, a customer may turn to an Article III Court to resolve a dispute;[2] he may also elect to proceed in arbitration, or in reparations. The Act

[2]There is no question that Schor believed that a federal forum was available to him. When Conti filed a federal action

(footnote continued on next page)

does not abrogate the Article III remedy; it merely provides a voluntary alternative.

To the extent that the Court of Appeals in the instant case found that the presence of litigant consent does not obviate Article III problems, that decision is in conflict with this Court's holdings in *Northern Pipeline, Thomas*, and previous

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(footnote continued from preceding page)

to pursue Schor's debit balance, Schor filed a counterclaim asserting his claim under the Commodity Exchange Act.

At the time of the transactions described in Schor's reparations complaint, most federal courts which had considered the question upheld the right of commodity customers to bring private actions for damages under the Act. *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Booth* v. *Peavy Company Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 764 (E.D. La. 1972); *Anderson* v. *Francis I. DuPont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

In *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir. 1973), the court of appeals upheld a private right of action under the Commodity Exchange Act on behalf of traders against a contract market and certain of its member firms. Thereafter, the Supreme Court assumed that the Act provided the plaintiffs with a private cause of action, but reversed on primary jurisdiction grounds, holding that the plaintiffs should be required, before filing suit, to pursue their claim in an administrative forum. *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 115 (1973). The law was so well settled that the Exchange in *Deaktor* did not even question the existence of a private right of action under the Act in its petition for certiorari. To the contrary, the Exchange supported its primary jurisdiction argument by noting that the "constant threat of harrassing suits" had placed it in "an intolerable position." (Pet. for cert., case no. 73-241, p. 11).

decisions. Certiorari should be granted to correct the erroneous application of this Court's precedents to an important question of federal law.

B. *The Decision Below Conflicts In Principle With Decisions In Other Circuits.*

Eleven circuit courts of appeals have considered the holding of *Northern Pipeline* in the context of the constitutionality of § 636(c) of the Federal Magistrates Act, 28 U.S.C. § 636(c) (1982). *Gairola* v. *Commonwealth of Virginia*, 753 F.2d 1281 (4th Cir. 1985); *D.L. Auld Co.* v. *Chroma Graphics Corp.*, 753 F.2d 1029 (Fed. Cir. 1985); *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985); *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Brothers Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (*en banc*), *cert. denied*, — U.S. —, 105 S.Ct. 906 (1984); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 218 (1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 172 (1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (*en banc*) *cert. denied*, — U.S. —, 105 S.Ct. 100 (1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983).

All eleven courts of appeals reached the identical ultimate conclusion that the Federal Magistrates Act does not run afoul of Article III. In arriving upon their judgments, most of the courts focused to some extent on both (1) the element of consent present in the reference of cases to federal magistrates and (2) the degree of control exercised over magistrates by Article III judges. While two of the circuits stressed the control factor (*Collins* and *Pacemaker*, *supra*), four circuits placed primary emphasis on the consent element (*Fields*, *Geras*, *Goldstein*, and *Wharton-Thomas*, *supra*). The relationship between magistrates and the federal judges who appoint and control them is so strong and so obvious that it could hardly be ignored in considering the Magistrates Act. However, one court of appeals held that litigant consent alone

satisfies an Article III analysis. *(United States* v. *Dobey, supra*).

Significantly, the D.C. Circuit itself, in its own Magistrates Act case, placed paramount importance upon the consent issue. In *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 894 (D.C. Cir. 1984), Judge MacKinnon[3] found "virtually dispositive" this Court's decision in *Heckers* v. *Fowler*, 69 U.S. 123 (1865), which upheld the consensual submission of a trial to a referee.

The Court of Appeals for the Tenth Circuit has held that parties may freely consent to waive any Article III right they might have to an Article III tribunal. A number of other Courts of Appeal, although not presented with the question of whether consent alone obviates Article III concerns, stressed the importance of consent in reaching their conclusions that the Federal Magistrates Act contains a permissible grant of legislative authority. The decision of the Court of Appeals in the instant case constitutes a direct conflict in principle with the Tenth Circuit and the direction shown by other circuits. This Court should, therefore, grant certiorari to resolve that conflict.

C. *This Court Should Settle, To The Extent It Has Not Already Done So, The Question Whether Litigant Consent Obviates Article III Concerns.*

When this Court addressed the issue of the interaction of Article III of the United States Constitution and the right of Congress to establish legislative procedures for the adjudication of rights in *Northern Pipeline*, it took on "an area of constitutional law . . . with . . . frequently arcane distinctions and confusing precedents . . ." *Northern Pipeline*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring). Justice Rehnquist observed that "The cases dealing with the authority of Congress to create courts other than by use of its power under Article III do not admit of easy synthesis." *Id.* But despite its attempts to synthesize those earlier cases and to resolve the confusion, the Court of Appeals for the District of

[3]Judge MacKinnon participated on the panel in the instant case.

Columbia Circuit, even with the guidance of *Northern Pipeline*, was left to conclude that "The jurisprudence on Article III jurisdiction is not, quite regretably, the clearest of constitutional fields." *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893 (D.C. Cir. 1984). As already noted, *supra* at p. 11, the Court of Appeals, in deciding the instant case, concluded that *Northern Pipeline* and the various decisions then available on the Magistrates Act provided no guidance on the question of whether consent alone obviates Article III problems. Likewise, the Court of Appeals apparantly found no guidance in *Thomas*.

While petitioner respectfully believes that *Northern Pipeline* and *Thomas* offer more guidance than was perceived by the Court of Appeals, the instant case presents for the first time the issue of whether consent alone, without the adjunct and control attributes inherent in the federal magistrates system, is sufficient to satisfy the separation of powers doctrine as it regulates the relationship between congressionally created rights and the protections of Article III. If there is confusion on that question, it should be eliminated to remove the cloud created by the instant case over whether litigants may safely turn to alternative dispute resolution forums.

This Court should grant certiorari, therefore, to settle the question whether litigant consent to resolution of a dispute in a non-Article III forum is sufficient to obviate Article III objections to an Act of Congress establishing such a forum.

D. *The Decision Below Erroneously Invalidates An Act Of Congress.*

(1) *Congress Expressly Directed The Commission To Hear Common Law Counterclaims.*

The Court of Appeals' opinion declined to invalidate the Act, finding instead that the legislative history is ambiguous. The opinion, however, invalidates an act of Congress as surely as if there had been an express holding to that effect.

The Court of Appeals was able to find ambiguity in the legislative history only by ignoring the one key passage of legislative history which removes any possible doubt.

Although the Court of Appeals professed to analyze the legislative history to determine whether a constitutional question was presented, the court below ignored the reference which had been cited to them in the briefs which explained that "the reparation program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts." H.R. Rep. 565, 97th Cong. 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904. The Court of Appeals' total disregard of this passage is inexplicable.

At the time that it amended the Act in 1983 Congress knew that the Commission had construed its statutory jurisdiction to extend to the adjudication of all counterclaims arising out of the transaction or occurrence described in a reparations complaint. Congress specifically approved of such jurisdiction since it was in total harmony with the basic purpose of reparations to pass upon the entire controversy surrounding each claim. In circumstances such as these, where Congress has manifested a continuing concern and intention over a period of years and has confirmed that intention when revisiting the statute, such subsequent legislative history is entitled to significant weight. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *Seatrain Shipbuilding Corp.* v. *Shell Oil Company*, 444 U.S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 (1968).

The Court of Appeals erred when it ignored the plain language and legislative history of the Act and concluded that Congress did not intend in 1974 for the Commission to exercise jurisdiction over ancillary common law counterclaims.

(2) *Submission Of Common Law Counterclaims To Reparations Is Consensual.*

The Court of Appeals also erroneously addressed the consent issue by ignoring the undisputed record on that subject. In the instant case, Schor elected, as do all reparations complainants, to have his claim adjudicated in a reparations

proceeding. In so doing, he expressly consented to the submission of his reparations claim to a non-Article III tribunal. In addition, he necessarily consented to adjudication by the Commission of any counterclaim against him.

Certainly, at the time that he filed his reparations claim, Schor knew that Conti could assert a counterclaim against him in a reparations proceeding. The regulations of the Commission empowered the adjudication of a counterclaim if it "arise[s] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (codified in 17 C.F.R. §12.23(b)(a) (1983)).

Moreover, Schor expressly *demanded* that Conti proceed on its counterclaim in reparations rather than before an Article III court. Before it learned that Schor had filed a reparations claim, Conti had already filed suit in the United States District Court for the Northern District of Illinois to collect the deficit in Schor's account. Schor moved to dismiss the federal action on the ground that Conti should be required to seek relief by filing a counterclaim in reparations. (App. J, p. 1). The district court denied the motion. Nevertheless, because the reparations trial was scheduled before the court trial, and in reliance upon assurances from Schor that Conti could assert its claim as a counterclaim in reparations, Conti voluntarily dismissed its federal court action. Under these circumstances, the panel was patently incorrect when it concluded (App. B, p. 25) that Schor did not knowingly consent to adjudication of Conti's counterclaim by the Commission.

A claimant need not invoke the Commission's reparations jurisdiction, but when he does, he necessarily consents to "take the bitter with the sweet." *Arnett* v. *Kennedy*, 416 U.S. 134, 153-54 (1974). So long as a claimant remains free to avail himself of the choice of presenting his claims to an Article III court, the additional right to have his claim adjudicated by the Commission, subject to the possibility that a counterclaim will be filed and decided, can no more offend Article III than does voluntary submission to arbitration, with the attendant possibility of a counterclaim.

Although it expressly refused to hold that the Act is unconstitutional under Article III, the Court of Appeals was able to avoid that question only by a patently incorrect interpretation of legislative history which ignored a key express statement of Congress. Similarly, the Court of Appeals was able to distinguish and disregard the consent element presented by the facts of the instant case only by ignoring the undisputed record. The Court of Appeals' opinion, however, leaves no doubt as to its practical impact. The opinion invalidates a congressionally created procedure, throws an entire industry into chaos, and creates unneeded business for already overburdened federal courts. That opinion is erroneous, and this Court should grant certiorari to review and correct it.

CONCLUSION

Petitioner respectfully suggests that this Court's holding in *Northern Pipeline* has settled the proposition that litigant consent obviates Article III concerns over congressionally created alternative dispute resolution forums. If so, the decision of the Court of Appeals is in conflict with that holding and certiorari should be granted to set the procedure established by Congress back on course. If *Northern Pipeline* did not settle the question, however, certiorari should nevertheless be granted to resolve the conflict in principle among the circuits on the question of consent and to resolve once and for all this vital question of federal law.

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DATE: October 16, 1985

APPENDIX A
(Judgment Order)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1703 September Term, 1983

William T. Schor,

Petitioner,

v.

Commodity Futures Trading Commission,

and

ContiCommodity Services, Inc.

and

Richard L. Sandor,

Respondents.

No. 83-1704

Mortgage Services of America,

Petitioner,

v.

Commodity Futures Trading Commission,

and

ContiCommodity Services, Inc.

and

Richard L. Sandor,

Respondents.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1703 et al. **September Term, 1984**

PAGE TWO

PETITIONS FOR REVIEW OF AN ORDER OF THE COMMODITY FUTURES TRADING COMMISSION.

Before: GINSBURG, Circuit Judge MacKINNON, Senior Circuit Judge, and PARKER* United States District Judge for the District of Columbia

J U D G M E N T

These causes came on to be heard on the petitions for review of an order of the Commodity Futures Trading Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the order of the Commodity Futures Trading Commission under review herein is hereby affirmed in part, vacated in part, and reversed in part, and these cases are remanded for further proceedings, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

George A. Fisher
Clerk

Date: August 10, 1984

Opinion for the Court filed by Circuit Judge Ginsburg.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX B
(Opinion of the Court Below, Reported at 740 F.2d 1262)

William T. SCHOR,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,
ContiCommodity Services, Inc. and Richard L. Sandor,

Respondents.

MORTGAGE SERVICES OF AMERICA,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,
ContiCommodity Services, Inc. and Richard L. Sandor,

Respondents.

Nos. 83-1703, 83-1704

United States Court of Appeals,
District of Columbia Circuit

Argued March 26, 1984

Decided August 30, 1984

Petitions for Review of an Order of the Commodity Futures Trading Commission.

Leslie J. Carson, Jr., Philadelphia, Pa., for petitioners in Nos. 83-1703, and 83-1704. Mark R. Eaton, Alexandria, Va., also entered an appearance for petitioners in Nos. 83-1703 and 83-1704.

Robert L. Byman, Chicago, Ill., for respondent, ContiCommodity Services, Inc. in Nos. 83-1703 and 83-1704.

Nancy E. Yanofsky, Attorney, Commodity Futures Trading Commission, Washington, D.C., with whom Kenneth M. Raisler, General Counsel and Whitney Adams, Deputy Gen. Counsel, Commodity Futures Trading Commission, Washington, D.C., were on the brief for respondent, Commodity Futures Trading Commission in Nos. 83-1703 and 83-1704.

Before GINSBURG, Circuit Judge, MacKINNON, Senior Circuit Judge, and PARKER,* United States District Judge for the District of Columbia.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

The principal question raised by this peition for review is whether the Commodity Futures Trading Commission ("CFTC" or "Commission") has authority to entertain counterclaims not alleging violations of the Commodity Exchange Act 1[1] ("CEA" or "Act") or CFTC regulations. Article III concerns impel us to construe the Act to deny the Commission that authority.

Petitioners William T. Schor and Mortgage Services of America (hereinafter collectively referred to as "Schor") filed complaints with the Commission seeking approximately $1.8 million in damages (reparations) from respondents Conti-Commodity Services, Inc. and Richard L. Sandor (hereinafter collectively referred to as "Conti"). Schor alleged that Conti had committed sundry violations of the Act and CFTC regulations in handling Schor's financial futures accounts.[2]

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[1] 7 U.S.C. §§ 1-22 (1976). Congress amended the CEA in 1974 to create the Commission and substantially expand the scope of federal regulation of the commodity futures industry. See Commodity Futures Trading Commission Act of 1974, Pub.L. No. 93-463, 88 Stat. 1389 (1974). Schor's suit is governed by the 1974 Act. Congress again significantly revised the Act in early 1983. *See* Futures Trading Act of 1982, Pub.L. No. 97-444, 96 Stat. 2294 (1983). These latter changes, insofar as they affect CFTC proceedings, became effective only as of May 1983, see *id.* § 239; they are not operative in these proceedings.

The changes effected in 1983 included renumbering the subsections in section 14 of the Act, 7 U.S.C. § 18. In this opinion, unless otherwise noted, we cite the 1976 United States Code, *i.e.*, the Act as it existed at the time Schor filed his complaint and the ALJ issued his decision.

[2] Financial futures are contracts to buy or sell interest-bearing investments on a fixed future date. A contract to buy is known as a "long" position; since the owner will be obligated to pay the contract price at the fixed date regardless of the security's market value, the worth of the position will diminish if rising interest rates drive down the security's value. Conversely, a contract to sell (or a "short" position) increases in

(footnote continued on next page)

Conti counterclaimed to recover over $90,000 in post-liquidation deficit balances in Schor's accounts.

After discovery, briefing, and a three-day trial, the Administrative Law Judge ("ALJ" or Law Judge") ruled against Schor on all aspects of his complaints and in favor of Conti on its counterclaims. The Commission declined to review the ALJ's decision; Schor then petitioned for judicial review. On all but one matter—Schor's contentions that Sandor "traded ahead" for his own account—we affirm the dismissal of Schor's complaints; on that sole matter, we remand to the Commission for an initial determination. On the principal question Schor's petition poses, we hold that the CFTC lacks authority (subject matter competence) to adjudicate Conti's counterclaims; we therefore reverse the ALJ's decision on the counterclaims and instruct their dismissal for lack of jurisdiction.

I. BACKGROUND

Petitioner Schor is the president and majority stockholder of petitioner Mortgage Services of America ("MSA"). MSA is a mortgage banker; it makes mortgage loans and then sells them to long-term investors. To hedge against shifts in interest rates, Schor entered the financial futures market.

Respondent Conti is a futures commission merchant registered with the CFTC. Respondent Sandor was the account executive at Conti in charge of Schor's accounts. Schor opened his Conti accounts in September 1976; at that time, Schor and MSA had a net worth of approximately $235,000 each. Over the next three years, Schor developed a heavily net "long" position.[3] He occasionally made additional deposits to his accounts in response to Conti's margin calls.[4]

(footnote continued from preceding page)

value as interest rates rise. *See generally* P. JOHNSON, COMMODITIES REGULATION §§ 1.03, 1.04 (1982).

[3] *See supra* note 2.

[4] A futures customer establishing an account with a futures commission merchant must deposit money—known as a "margin"—to protect the merchant from losses caused by

(footnote continued on next page)

At that time of the events principally at issue in this proceeding, Schor's accounts were seriously undermargined.

On October 6, 1979, the Federal Reserve Board announced decisions Schor deemed likely to increase interest rates, thereby rendering unenviable his net long position.[5] On the following Monday—October 8—petitioner Schor attempted to call respondent Sandor for the alleged purpose of taking up short positions to hedge against rising interest rates. Sandor was out of the office that day; Schor spoke instead with several other Conti employees.

In testimony before the ALJ, the parties presented sharply conflicting versions of the Schor-Conti October 8, 1979, conversations. Schor insists that he wanted to take up short positions, but was blocked from trading because of instructions Sandor had given concerning Schor's accounts. Conti, on the other hand, presented evidence suggesting that Schor merely sought market information, but declined to trade when asked if he wished to do so.

When Schor spoke to Sandor the following day—October 9—Schor stated that further margin calls on petitioners' accounts could not be met. Pursuant to the parties' customer agreement, Conti then liquidated Schor's accounts. After liquidation, Schor's accounts retained substantial deficit balances.

(footnote continued from preceding page)

market fluctuations adversely affecting a customer's positions. Changes in market prices for a particular futures contract may erode the original deposit, leading a broker to issue a margin call for additional funds. Margin requirements are established by the exchange where a transaction takes place. *See generally* P. JOHNSON *supra* note 2, § 1.10, at 30-32.

[5] *See* Petitioners' Brief at 11. The Administrative Law Judge, however, found "[t]here was no consensus among financial traders as to the impact these [October 6] decisions would have o[n] the price of financial futures." *Initial Decision*, CFTC Docket No. R 80-566-80-723, at 4-5 (Oct. 19, 1981), *reprinted in* Appendix ("App.") 872-73.

In February 1980, Schor filed reparations complaints with the CFTC to recover from Conti losses suffered in Schor's futures trading ventures; he alleged numerous violations of the Commodity Exchange Act and CFTC regulations. Conti counterclaimed to recover the deficit balances remaining in Schor's accounts.[6] After trial in March 1981, the ALJ issued an initial decision denying relief to Schor and awarding judgment to Conti on its counterclaims. *See Initial Decision*, CFTC Docket No. R 80-566-80-723 (Oct. 19, 1981), *reprinted in* Appendix ("App.") 869-80.[7] The Commission found no question of law or policy warranting its consideration of the merits of the ALJ's determinations; it therefore allowed the initial decision to become final. *See Order Denying Review*, CFTC Docket No. 4. 80-566-80-723 (June 15, 1983), *reprinted*

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[6] Conti first filed suit to recover the deficit balances in the United States District Court for the Northern District of Illinois. *Conti Commodity Services, Inc.* v. *Mortgage Services of America, Inc.*, No. 80-C-1089 (N.D. Ill. filed Mar. 4, 1980). Conti later voluntarily dismissed that action, choosing instead to counterclaim in the CFTC proceeding.

[7] Schor argues that the ALJ, by adopting in large part a proposed decision drafted by Conti, impermissibly delegated his decision-writing responsibility. *See* Petitioners' Brief at 50-53. The Commission, while disapproving this "adoption" technique, held that no reversible abuse of discretion had occurred. *Order Denying Review*, CFTC Docket No. R 80-566-80-723, at 1 n.1 (June 15, 1983), *reprinted in* App. 939 n.1. We agree that a decisionmaker's wholesale adoption of a party's submission may undermine "[c]onfidence in the integrity of the [administrative] process." *Southern Pac. Communications Co.* v. *AT&T*, 740 F.2d 980, 995 (D.C.Cir. 1984). In light of the record made at trial, however, we do not consider the Law Judge's substantial acceptance of Conti's proposed decision independently sufficient grounds for reversal. *Cf. Valentino* v. *United States Postal Serv.*, 674 F.2d 56, 60 n.2 (D.C.Cir. 1982) (district court's substantial acceptance of appellee's proposed findings did not warrant overturning decision); *Hagans* v. *Andrus*, 651 F.2d 622, 626 (9th Cir.) (same), *cert. denied*, 454 U.S. 859, 102 S.Ct. 313, 70 L.Ed.2d 157 (1981); *Hayes* v. *Thompson*, 637 F.2d 483, 490 (7th Cir. 1980) (same).

in App. 939-40.[8] Schor then petitioned for this court's review.[9]

II. PETITIONERS' CLAIMS

Schor maintains that, in dismissing his reparations claims, the ALJ erred in several critical respects. With one exception, we find Schor's objections utterly insubstantial.

First, Schor asserts that Conti neglected "to issue margin calls adequate to meet margin requirements and to enforce those requirements by liquidation of the accounts if they remained undermargined for any period of time." Petitioners' Brief at 32. These alleged oversights, Schor contends,

[8]Schor challenges the Commission's *Order Denying Review* on the ground that "the Commission permit[ted] [the ALJ] decision to stand based upon reasoning that the Commission rejects." Petitioners' Brief at 54. We read the Commission's Order differently; the Commission stated that it "neither adopted the Presiding Officer's order as its own nor affirmatively passed upon any of the issues decided therein." *Order Denying Review* at 1, *reprinted in* App. 939 (footnote omitted). We discern in this language nothing more than a discretionary denial of review, an option Schor concedes to be within the Commission's authority. *See* Petitioners' Brief at 54; *see also* 17 C.F.R. §§ 12.95(e), 12.101 (1983) (stating CFTC policy of providing only discretionary review of ALJ decisions).

[9]The CEA provides that a party seeking judicial review of a Commission ruling shall

> file [ ] with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail.

7 U.S.C. § 18(g). Schor argues that Congress did not intend this appeal bond provision to apply to customers seeking review of counterclaim awards; if the provision does apply to nonregistrant complainants, Schor further contends, it violates the due process clause and the equal protection component of the Fifth Amendment. Petitioners' Brief at 19-25. Our disposition of Conti's counterclaims renders resolution of these issues unnecessary.

violated the CEA's anti-fraud provision, 7 U.S.C. §6(b), as well as the Commission regulation requiring futures brokers to "diligently supervise the handling of all commodity interest accounts," 17 C.F.R. §166.3 (1983). The Commission has repeatedly ruled that a futures broker's decisions concerning margin requirements, even if in violation of commodity exchange rules, are subject to review only under the lenient business judgment rule unless bad faith is shown. *See Friedman* v. *Dean Witter & Co.*, [1980-1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,307 at 25,536-38 (Nov. 13, 1981); *Graves* v. *Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,301 at 25,521-22 (Oct. 14, 1981); *Baker* v. *Edward D. Jones & Co.*, [1980-1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,167 at 24,770-72 (Jan. 27, 1981), *appeal dismissed sub nom. Baker* v. *CFTC*, 661 F.2d 871 (10th Cir. 1981) (per curiam).

We uphold the Commission's position as a reasonable interpretation of the Act. *See, e.g., First Commodity Corp. v. CFTC*, 676 F.2d 1, 4-7 (1st Cir. 1982); *British American Commodity Options Corp.* v. *Bagley*, 552 F.2d 482, 489-92 (2d Cir.), *cert. denied*, 434 U.S. 938, 98 S.Ct. 427, 54 L.Ed.2d 297 (1977). *See generally Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969) ("[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . .") (footnote omitted). The CFTC's business judgment approach reflects the "special status accorded margin under the Commodity Exchange Act." *Baker* v. *Edward D. Jones & Co.*, [1980-1982 Transfer Binder] COMM. FUT.L.REP. (CCH) at 24,770. The CEA specifically excepts "the setting of levels of margin" from the Commission's authority to approve, disapprove, or alter contract market rules. *Id.*; *see* 7 U.S.C. §§ 7a(12), 12a(7)(C). Futures brokers have an incentive, wholly apart from CFTC regulation, to impose and enforce reasonable minimum margin requirements; they assume responsibility to third persons for any trading losses sustained, but not honored, by their customers. See P. JOHNSON, COMMODITIES REGULATION § 1.10, at 32 (1982).

Schor has not alleged bad faith on the part of Conti in handling margin requirements on petitioners' accounts. Nor would the record support a charge of bad faith. We therefore reject Schor's arguments concerning Conti's alleged failure to police petitioners' margin deposits. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Brooks*, 548 F.2d 615, 615 (5th Cir.) (per curiam) (rejecting proposition that "a sophisticated commodity futures investor who at all times possessed knowledge of his deficient margin account status . . . should not be required to pay back any remaining indebtedness because the extension of credit violated a rule or regulation of the Chicago Board of Trade"), *cert. denied*, 434 U.S. 855, 98 S. Ct. 173, 54 L.Ed.2d 126 (1977).

Schor next attacks the Law Judge's determination that Conti did not "fail [ ] to accept and act upon directions given by [Schor]" on October 8.[10] *See Initial Decision* at 2, *reprinted in* App. 870. As earlier stated, the parties presented conflicting accounts of the October 8 telephone conversations between Schor and Conti employees. The testimony on this issue required the ALJ to resolve a credibility question. *See id.* at 7, *reprinted in* App. 875. The ALJ's determination that Conti's position was more credible than Schor's is plainly stated and adequately explained. We therefore spy no error in the Law Judge's finding that "Schor . . . declined to place any market orders" on October 8. *Id.* at 8, *reprinted in* App. 876; *see, e.g., Myron* v. *Hauser*, 673 F.2d 994, 1005 (8th Cir. 1982); *Haltmier* v. *CFTC*, 554 F.2d 556, 561-62 (2d Cir. 1977); *Silverman* v. *CFTC*, 549 F.2d 28, 32 (7th Cir. 1977) (all refusing to disturb ALJ credibility determinations). *See generally Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496, 71 S.Ct. 456, 468, 95 L.Ed. 456 (1951).

Schor further urges that Conti violated the Act and CFTC regulations by allowing Schor to maintain "unsuitable" positions. [11]

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[10] Schor alleges that Conti, by preventing him from trading his accounts on October 8, 1979, violated the Act's anti-fraud provision as well as the Commission's diligent supervision regulation. Petitioners' Brief at 37.

[11] One commentator has described the "suitability doctrine" as follows: "A broker-dealer must have reasonable grounds for

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We need not decide whether a suitability requirement is implicit in the Act.[12] The Law Judge found that petitioners "were eminently suited to trade the futures contracts involved in this proceeding." *Initial Decision* at 9, *reprinted in* App. 877. The record amply supports that finding. *See, e.g.*, App. 145 (Schor's testimony as to his considerable experience in futures trading).

We turn finally to the sole objection to the ALJ's decision on Schor's claims that warrants a remand. Schor contends that respondent Sandor, after announcing his intention to liquidate petitioners' accounts, first traded for his own account positions identical to petitioners' at a better price than he ultimately obtained for theirs. Schor unambiguously charged before the Law Judge that this alleged conduct violated the CEA and CFTC regulations. *See* Complainants' Reply Brief at 19 (July 13, 1981), *reprinted in* App. 795. He repeated the charge in his petition for CFTC review. *See* Application of MSA for Commission Review of Initial Decision at 25-27 (Nov. 9, 1981), *reprinted in* App. 922-24. Neither the ALJ's *Initial Decision* nor the Commission's *Order Denying Review* addressed Schor's point. As a court of

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believing that all recommendations made are suitable for each customer in light of his financial situation and objectives." T. RUSSO, REGULATION OF THE COMMODITIES FUTURES AND OPTIONS MARKETS § 12.38, at 12-75 (1983) (footnote omitted).

[12] The CFTC once proposed, but failed to adopt, a suitability rule. *See* T. Russo, *supra* note 11, § 12.38, at 12-75-76. On two occasions, the Commission has expressly reserved the question whether a suitability requirement is implicit in the Act. *Avis* v. *Shearson Hayden Stone, Inc.* [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,379, at 25,829 n. 4 (Apr. 13, 1982); *Jensen* v. *Shearson Hayden Stone, Inc.* [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,324, at 25,582 n. 1 (Oct. 9, 1981). At least one federal court has squarely rejected the claim that a commodity broker's failure to find suitable investments violates the Act. *J.E. Hoetger & Co.* v. *Asencio*, 558 F. Supp. 1361, 1364 (E.D. Mich. 1983); *cf. Myron* v. *Hauser*, 673 F.2d 994, 1006 (8th Cir. 1982) ("[broker's] liability . . . not premised upon violation of a nonexistent suitability standard").

review, we are disinclined to determine the merits of Schor's "trading ahead" claim without benefit of an explicit administrative ruling on it. Accordingly, we return this single aspect of Schor's claims[13] to the Commission for further consideration.

III. CFTC JURISDICTION OVER COMMON LAW COUNTERCLAIMS

Schor contests the ALJ's judgment in favor of Conti on its breach of contract counterclaims. He argues that the Commodity Exchange Act limits the Commission's jurisdiction over counterclaims to those alleging violations of the Act or CFTC regulations.[14] The Administrative Law Judge remarked that Schor perhaps had "a neat legal point," although its resolution was beyond the ken of an officer "bound by agency regulations and published agency policies." *Initial Decision* at 11, *reprinted in* App. 879.

The Commission has defined the scope of its counterclaim jurisdiction in Reparation Rule 12.23(b)(2):

> An answer may set forth as a counterclaim facts alleging a violation and a request for a reparation award that would be a proper subject for complaint under § 12.21 or *any claim* which at the time the complaint is served the registrant has against the complainant *if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.*

[13] We reject as frivolous Schor's contention that Conti's counterclaim award should be reduced to reflect the payments respondent Sandor made to Conti to partially offset the post-liquidation deficit balances in Schor's accounts. *See* Petitioners' Brief at 49-50. Conti policy required Sandor to make those payments. Schor clearly is not an intended beneficiary of that arrangement. *See generally* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 17-2, at 607 (2d ed. 1977); L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 116, at 245-47 (2d ed. 1965).

[14] Our disposition of the jurisdiction issue makes it unnecessary to reach Schor's further claim that Commission adjudication of common law counterclaims violates his Seventh Amendment right to a jury trial. *See* Petitioners' Brief at 29-31.

17. C.F.R. § 12.23(b)(2) (1983) (emphasis added). The rule, as interpreted by the Commission, permits CFTC adjudication of deficit balance counterclaims. *See Friedman* v. *Dean Witter & Co.*, [1980–1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,307 (Nov. 13, 1981). Schor concedes that Conti's counterclaims fall within the Rule 12.23(b)(2) definition. Petitioners' Brief at 27. The question we are called upon to resolve is whether the Commission's broad definition of permissible counterclaims is consistent with the Commodity Exchange Act.

Neither party, before the Commission or in presenting the case to this court, discussed the relevance of Article III of the Constitution[15] to the question whether Congress intended, or is empowered to authorize, the CFTC to entertain common law counterclaims. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) ("*Northern Pipeline*"), demonstrates that adjudication of state law claims by non-Article III federal tribunals poses serious constitutional questions. Because the issue concerns subject matter jurisdiction, we raised the question on our own motion;[16] we first instructed the parties to address the Article III issue at oral argument,[17] and then invited supplemental briefing.[18]

Well established principles of statutory interpretation require us, before reaching difficult constitutional issues, to "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander* v. *TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688

[15] The portions of Article III in point are quoted infra at p. 1269.

[16] See, e.g., *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.* 725 F.2d 537, 540 (9th Cir. 1984) (en banc); *Wharton-Thomas* v. *United States*, 721 F.2d 922, 925 (3d Cir. 1983) (Article III issue raised by court on own motion); *cf. Collins* v. *Foreman*, 729 F.2d 108, 111 (2d Cir. 1984) (court refused to hold party waived Article III objection by neglecting to raise it prior to trial).

[17] Notice, Nos. 83-1703, 83-1704 (D.C. Cir. Mar. 23, 1984).

[18] The court directed supplemental briefing from the bench at the conclusion of oral argument.

(1936) (Brandeis, J., concurring) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932)); *accord NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500, 99 S.Ct. 1313, 1318, 59 L.Ed.2d 533 (1979); *Lynch* v. *Overholser*, 369 U.S. 705, 710-11, 82 S.Ct. 1063, 1067-68, 8 L.Ed.2d 211 (1962); *International Association of Machinists* v. *Street*, 367 U.S. 740, 749 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961). In *NLRB* v. *Catholic Bishop, supra*, the Supreme Court indicated the sequence of questions a court should address and answer in cases of this sort. *See also EEOC* v. *Pacific Press Publishing Association*, 676 F.2d 1272, 1276 (9th Cir. 1982). First we "determine whether the [Commission's] exercise of its jurisdiction here would give rise to serious constitutional questions." 440 U.S. at 501, 99 S.Ct. at 1319. We resolve that inquiry in the affirmative. Therefore, we next ask whether Congress had a "clearly expressed" intention to vest the Commission with the constitutionally questionable jurisdiction. *Id.* (quoting *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 22, 83 S.Ct. 671, 678, 9 L.Ed.2d 547 (1963)). Discovering no explicit congressional intention to do so, we conclude that the CEA does not authorize the Commission to adjudicate Conti's breach of contract counterclaims.

A. Article III Inquiry

Article III of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. CONST. art. III, § 1. "Judges, both of the supreme and inferior Courts," enjoy tenure "during good Behaviour," and receive salaries not subject to diminution during their term of office. *Id.* It is undisputed that the CEA does not extend these Article III protections to CFTC commissioners. *See* 7 U.S.C. § 4a(a). We therefore explore the question whether it is compatible with Article III to commit as the Commission's counterclaim rule does, adjudication of common law, breach of contract counterclaims to officers not enjoying life tenure and irreducible compensation.

Supreme Court decisions defining the scope of Congress' discretion to vest federal judicial power in non-Article III

tribunals "do not admit of easy synthesis." *Northern Pipeline*, 458 U.S. at 91, 102 S.Ct. at 2881 (Rehnquist, J., concurring in the judgment).[19] To resolve the matter before us, however, we need not attempt the heraclean labor of rationalizing a host of "arcane distinctions and confusing precedents" accumulated over a span of 150 years. *Id.* at 90, 102 S.Ct. at 2881. The Supreme Court's latest Article III pronouncement —*Northern Pipeline, supra*—conjoined with post-*Northern Pipeline* court of appeals decisions, generates doubt concerning the constitutionality of Commission Rule 12.23(b)(2) sufficient to impel us to interpret the CEA as withholding from the Commission jurisdiction (subject matter competence) over common law counterclaims.

In *Northern Pipeline*, the Court tested the jurisdictional provision of the Bankruptcy Act of 1978 ("1978 Act"), 28 U.S.C. § 1471 (1982), for compatibility with Article III. The 1978 Act had established bankruptcy courts "in each judicial district, as an adjunct to the district court for such district." *Id.* § 151(a). These courts were staffed by judges not enjoying Article III's tenure and salary guarantees. *See id.* §§ 153(a), 153(b), 154. Nonetheless, Congress authorized the bankruptcy judges to exercise jurisdiction over "all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11." *Id.* §§ 1471(b), (c). The 1978 Act vested bankruptcy courts with all of the "powers of a court of equity, law, and admiralty," except that they could not "enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." *Id.* § 1481.

Northern Pipeline involved a common law, breach of contract claim brought by a company undergoing chapter 11 reorganization against its purported debtor. Six Justices agreed that Article III prohibits a non-Article III federal

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[19] *See also* Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 Geo. L.J. 297, 298-99 (1981) ("the precedents in this area are so vague or inconsistent as to prove meaningless at best") (footnote omitted); Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 Duke L.J. 197, 228 (Article III line of cases "largely confused and unprincipled").

tribunal from adjudicating such state law claims over the objection of one of the litigants. But only four members of the Court concurred in Justice Brennan's elaboration of Article III principles; Justice Rehnquist, joined by Justice O'Connor, concurred only in the Court's judgment. We therefore examine both the plurality and concurring opinions in *Northern Pipeline* for the light they shed on the Article III problem at hand. We also look to post-*Northern Pipeline* circuit court decisions holding the 1979 Magistrates Act compatible with Article III; these decisions provide instruction on whether petitioners' putative consent ameliorates any otherwise existing Article III flaws in CFTC adjudication of Conti's common law counterclaims.

Justice Brennan's plurality opinion in *Northern Pipeline* considered, and rejected, two theories proffered to rescue bankruptcy court jurisdiction from constitutional assault: the "legislative court" exception; and the Article III court "adjunct" accommodation. CFTC jurisdiction over common law counterclaims does not fit within either theory under Justice Brennan's analysis.

The *Northern Pipeline* plurality initially considered the claim that bankruptcy courts may be placed under the Article III exception carved long ago for "legislative courts."[20] Justice Brennan recognized "three narrow situations" in which Article III allows Congress to vest the judicial power of the United States in federal tribunals not cloaked with Article III protections. *See* 458 U.S. at 64, 102 S.Ct. at 2868. The first two exceptions—territorial courts and courts martial—were clearly inapplicable in *Northern Pipeline, see id.* at 64-66, 102 S.Ct. at 2868-69, and are no more relevant here. The third exception recognized by the plurality involved legislative court adjudication of "public rights" cases. *Id.* at 67, 102 S.Ct. at 2869.[21] The CFTC argues that

[20] Chief Justice Marshall inaugurated the legislative courts doctrine in *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828).

[21] *See also Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450, 97 S.Ct. 1261, 1266, 51 L.Ed.2d 464 & n. 7 (1977); *Crowell* v. *Benson*, 285 U.S. 22, 50-51, 52 S.Ct. 285, 292-93, 76 L.Ed. 598 (1932); *Ex parte Bakelite Corp.* 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L.Ed.

(footnote continued on next page)

Commission reparations proceedings "fall squarely within the 'public rights' predicate for legislative court jurisdiction advanced by the *Northern Pipeline* plurality." Commission Supplemental Brief at 28.

Justice Brennan explained the public rights doctrine principally in separation of powers terms:

> [T]he Framers expected that Congress would be free to commit [matters arising between the Government and persons subject to its authority] completely to nonjudicial determination, and . . . as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.

458 U.S. at 67, 68, 102 S.Ct. at 2869, 2870 (citing *Crowell* v. *Benson*, 285 U.S. 22, 50, 52 S.Ct. 285, 292, 76 L.Ed. 598 (1932)) (footnote omitted). The plurality acknowledged that the public/private rights distinction "has not been definitively explained in the Court's precedents." 458 U.S. at 69, 102 S.Ct. at 2870 (footnote omitted). However, for a matter to fall within the public rights doctrine, Justice Brennan stated, it "must at a minimum arise 'between the government and others.'" *Id.* (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L.Ed. 789 (1929)); *see also* 458 U.S. at 69 n. 23, 102, S.Ct. at 2870 n. 23. Thus, for example, the *Northern Pipeline* plurality acknowledged that the actual discharge in bankruptcy, in contrast to adjudication of the bankrupt's common law claims against third parties, "may well be a 'public right.'" *Id.* at 71, 102 S.Ct. at 2871.

"Private-rights disputes," on the other hand, involve the liability of one individual to another; they "lie at the core of the historically recognized judicial power." *Id.* at 69-70, 102 S.Ct. at 2870-71. Such cases, the plurality stated, may not be adjudicated by congressionally established legislative courts. As in *Northern Pipeline*, respondent Conti's counterclaims involve "adjudication of state-created private rights, such as the right to recover contract damages"; claims of this kind

(footnote continued from preceding page)

789 (1929); *Murray's Lessee* v. *Hoboken Land & Improvement Co.* 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372 (1856).

"obviously [are] not [public rights]." *See id.* at 71, 102 S.Ct. at 2871.

Appellants in *Northern Pipeline* also sought to validate the bankruptcy court as an "adjunct" of the Article III district court. The plurality read precedent in point—*Crowell* v. *Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), and *United States* v. *Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980)—as establishing two principles relevant to Congress' allocation of "traditionally judicial functions" to non-Article III adjuncts. 458 U.S. at 80-81, 102 S.Ct. at 2876-77. First, Justice Brennan stated, "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges." *Id.* at 80, 102 S.Ct. at 2876 (footnote omitted). Second, "the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III Court." *Id.* at 81, 102 S.Ct. at 2876 (quoting *Crowell*, 285 U.S. at 51, 52 S.Ct. at 292).

The plurality found bankruptcy court jurisdiction over state law claims constitutionally suspect under both principles. Possible distinctions between the bankruptcy courts and the CFTC are of insufficient weight to persuade us that Justice Brennan's *Northern Pipeline* opinion is of limited relevance to this case; we have serious doubts whether Commission jurisdiction over common law counterclaims satisfies either of the *Northern Pipeline* plurality's principles concerning congressional discretion to assign to non-Article III adjuncts the nation's "judicial power."

While Justice Brennan acknowledged broad congressional authority to create adjuncts "to aid in the adjudication of congressionally created statutory rights," he determined that Article III places greater restraints on Congress' ability to "assign [ ] traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress." 458 U.S. at 81-82, 102 S.Ct. at 2877 (emphasis in original); *see also id.* at 83-84, 102 S.Ct. at 2877-78. The *Northern Pipeline* plurality opinion, in short, indicates that Congress has "minimal" discretion to assign adjudication of Conti's state-created

rights to a non-Article III adjunct. *Id.* at 84, 102 S.Ct. at 2878; *see also Kalaris* v. *Donovan*, 697 F.2d 376, 386 (D.C. Cir.) ("*Northern Pipeline* effectively held that certain private *state* law claims, when adjudicated within the federal system, must be decided by Article III courts.") (emphasis in original) (footnote omitted), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3088, 77 L.Ed.2d 1349 (1983).[22]

CFTC adjudication of Conti's state law counterclaims is also vulnerable under the second "adjunct" principle announced by Justice Brennan. That principle—ultimate decisionmaking power should remain with the Article III tribunal rather than the adjunct—encompassess several related notions. The *Northern Pipeline* plurality's discussion of the principle focused upon the Court's earlier decision in *United States* v. *Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980).

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[22] The Commission urges that we validate its Rule 12.23(b)(2) on the ground that counterclaims to recover customer account deficit balances "arise under" federal law within the meaning of Article III. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), is featured as supporting this argument. Commission Supplemental Brief at 24-27. The Commission's contention seems misfocused in this sense: it addresses Congress' power to place Conti's counterclaim in federal court rather than what is at issue here—Congress' power to place Conti's counterclaims in a non-Article III federal tribunal.

Even if apposite, the *Verlinden* analogy fails on its merits. The Commission can identify no express congressional plan deliberately to channel broker-customer contract claims into the CFTC. *See* 103 S.Ct. at 1973. If Congress had such a plan, the limitation of Commission adjudicatory authority to state law counterclaims would make no sense. Nor do we discern what "detailed federal law standards" an ALJ would be called upon to apply in adjudicating a broker-customer claim to recover deficit balances. *See id.* at 1971.

For reasons indicated in the text, we cannot regard the CFTC as an Article III court adjunct and in that capacity equipped to exercise ancillary jurisdiction (*see* Commission Supplemental Brief at 22-23) over contract-based counterclaims.

In *Raddatz* the Court held that Article III permits the adjudication of constitutional claims, *i.e.*, noncongressionally-created rights, by a magistrate not cloaked with Article III protections.[23] "Critical to the *Raddatz* Court's decision to uphold the Magistrates Act," Justice Brennan explained, "was the fact that the ultimate decision was made by the district court," 458 U.S. at 83, 102 S.Ct. 2877 (citing *Raddatz*, 447 U.S. at 683, 100 S.Ct. at 2146); the Magistrates Act provided for district court *de novo* review of the magistrate's proposed findings and recommendations. *See Raddatz*, 447 U.S. at 681-82, 100 S.Ct. at 2415-16; 28 U.S.C. § 636(b)(1) (1976). Indeed, the *Raddatz* Court stated that "[w]e view the statutory scheme here as rendering a magistrate's recommendations more analogous to a master or a commissioner *than to an adminstrative agency* for Art. III purposes." 447 U.S. at 682-83 100 S.Ct. at 2415-16 (emphasis added) (footnote omitted).

The CEA provides that Commission findings of fact are conclusive "if supported by the weight of the evidence." 7 U.S.C. § 9. That standard of review does not permit the reviewing court to "reweigh[ ] the evidence to ascertain in which direction it preponderates"; rather, the court must limit itself to "review[ing] the record with the purpose of determining whether the finder of ...fact...acted reasonably, in concluding that the evidence...supported his findings." *Haltmier* v. *CFTC*, 554 F.2d 556, 560 (2d Cir. 1977)

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[23]The 1976 Magistrates Act amendments authorized magistrates to adjudicate nondispositive pretrial motions subject to district court review under a clearly erroneous standard. The amendments also empowered magistrates to make findings and recommendations on dispositive pretrial motions and in prisoner cases, subject to *de novo* district court review upon a party's objection. 28 U.S.C. § 636(b)(1) (1976). The constitutional validity of this latter power was at issue in *Raddatz*. The 1979 amendments to the Magistrates Act permitted magistrates, upon both parties' consent, to conduct all proceedings in a civil action and to enter final judgment. *Id.* § 636(c)(1982). *See infra* p. 1275.

(quoting *Great Western Food Distributors, Inc.* v. *Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997, 73 S.Ct. 1140, 97 L.Ed. 1404 (1953)); *accord Precious Metals Associates, Inc.* v. *CFTC*, 620 F.2d 900, 903 (1st Cir. 1980). Thus, in contrast to *Raddatz*, "ultimate decisionmaking authority" under the CEA does not "clearly remain[ ] with the [federal] court." *Northern Pipeline*, 458 U.S. at 79, 102 S.Ct. at 2876 (citing *Raddatz*, 447 U.S. at 682, 100 S.Ct. at 2415); *see also In re Kaiser*, 722 F.2d 1574, 1581 (2d Cir. 1983); *White Motor Corp.* v. *Citibank*, 704 F.2d 254, 263 (6th Cir. 1983) (both relying, in part, on provision for district court *de novo* review of certain bankruptcy court decisions in rejecting Article III challenge to Interim Bankruptcy Rules).

Justice Brennan noted two other ways in which *Raddatz* magistrates "were subject to sufficient control by an Art. III district court." 458 U.S. at 79, 102 S.Ct. at 2875. Judicial control is significant to the constitutional inquiry because, as the Court has often stated, Article III's tenure and salary guarantees principally serve a separation of powers function; their dominant purpose is "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government." *Id.* at 59, 102 S.Ct. at 2865 (footnote omitted); *accord United States* v *Will*, 449 U.S. 200, 217-20, 101 S.Ct. 471, 481-83, 66 L.Ed.2d 392 (1980); *O'Donoghue* v. *United States*, 289 U.S. 516, 530-35, 53 S.Ct. 740, 743-45, 77 L.Ed. 1356 (1933). By placing large measures of control over magistrates in the federal judiciary, rather than in the President or Congress, the Magistrates Act avoided some of the constitutional pitfalls the Court found in the Bankruptcy Act of 1978. No similar features appear in the Commodity Exchange Act.

As a first element of judicial control distinguishing the Magistrates Act from the Bankruptcy Act of 1978, magistrates "were appointed, and subject to removal, by the district court." *Northern Pipeline*, 458 U.S. at 79, 102 S.Ct. at 2875 (citing *Raddatz*, 447, U.S. at 685, 100 S.Ct. at 2417

(Blackmun, J., concurring) (footnote omitted). The Magistrates Act provided that the Judicial Conference of the United States, composed exclusively of Article III judges, *see* U.S.C. § 331, would determine the number of magistrate positions for each district. *Id.* § 633(b). The Act further provided for selection of magistrates by the judges of the judicial district in which the magistrates were to serve. *Id.* § 631(a). Those same judges had authority to remove a magistrate from office during the term of appointment "for incompetency, misconduct, neglect of duty, or physical or mental disability." *Id.* § 631(h). Additionally, a particular magistrate's office could be terminated upon a Judicial Conference determination "that the services performed by his office are no longer needed." *Id.*

The Commodity Futures Trading Commission, on the other hand, is "an independent agency of the United States Government." 7 U.S.C. § 4a(a). Commissioners are appointed, not by the judiciary, but by the President, with the advice and consent of the Senate. *Id.* While no more than three of the five commissioners may be of the same political party, the statute is designed to allow the President to appoint one new Commissioner each year. *Id.* Thus, what was said of the Magistrates Act cannot be said of the CEA—that "the only conceivable danger of a 'threat' to the 'independence' of the [adjudicator] comes from within, rather than without, the judicial department." *Raddatz*, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring), *quoted* in *Northern Pipeline*, 458 U.S. at 79 n. 30, 102 S.Ct. at 2875 n. 30.

A second judicial control found in the Magistrates Act, Justice Brennan observed, concerned the district courts' referral authority: "[T]he magistrate considered [suppression] motions only upon reference from the district court." 458 U.S. at 79, 102 S.Ct. at 2875. The Magistrates Act did not compel the district court to refer any matters to the magistrate. *See Raddatz*, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring). Moreover, when references were made the district courts "establish[ed] rules pursuant to

which the magistrates . . . discharge[d] their duties," 28 U.S.C. § 636(b)(4); *see Raddatz*, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring).

The federal judiciary exercises no similar control over the CFTC. Whether a matter will be initially determined by an Article III court or the Commission depends entirely upon the actions of private litigants. Once a party selects the CFTC as its forum, the federal courts' only potential involvement is as an enforcer of reparation awards, 7 U.S.C. § 18(f), or as a reviewer of judgments, *id.* § 18(g). Thus, we cannot say here that "the institutional interests of the judiciary are secured by the district court's control over. . . the references." *Goldstein* v. *Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984) (upholding constitutionality of 1979 Magistrates Act); *see also In re Kaiser*, 722 F.2d 1574, 1581, (2d Cir. 1983); *White Motor Corp.* v. *Citibank*, 704 F.2d 254, 263 (6th Cir. 1983) (both relying, in part, on the district court's specific authority to revoke referral of particular cases to bankruptcy court in rejecting Article III challenge to Interim Bankruptcy Rules).

The Commission further seeks to validate its counterclaim rule by analogizing CFTC reparations proceedings to arbitration; in both settings, the Commission argues "the parties voluntarily elect to submit their claims to a non-Article III forum." Commission Supplemental Brief at 14 n. 9; *see also* Conti Supplemental Brief at 20-23. Arbitration, however, is not an apt analogy; it does not implicate the separation of powers concerns motivating the *Northern Pipeline* decision. Private parties may, without offense to the Constitution, agree to settle their disputes outside the federal adjudicatory system; district court enforcement of arbitration awards is not alone sufficient to require the invocation of Article III safeguards. Constitutional constraints are called into play, however, when Congress establishes a comprehensive adjudicatory alternative to the federal courts—such as the CFTC—without providing tenure and salary guarantees.

In sum, Justice Brennan's plurality opinion in *Northern Pipeline* raises grave doubts concerning the constitutionality of CFTC Rule 12.23(b)(2).[24] Since only four members of the Court joined that opinion, however, we look to Justice Rehnquist's concurrence (joined by Justice O'Connor) to detect the

[24] We recognize that the Commodity Exchange Act, if read to authorize Commission adjudication of state common law counterclaims, would not exhibit all of the Article III flaws the *Northern Pipeline* plurality discovered in the 1978 Bankruptcy Act. In several respects, the CEA retains more of "the essential attributes of the judicial power" in the Article III courts than did the Bankruptcy Act.

First, the CFTC more closely resembles the agency in *Crowell* v. *Benson* which dealt only with "a particularized area of law," *Northern Pipeline*, 458 U.S. at 85, 102 S.Ct. at 2878, than the bankruptcy courts which, under the 1978 Act, were to exercise jurisdiction in "all civil proceedings arising under title 11 or arising in or *related* to cases under title 11." 28 U.S.C. § 1471(b), quoted in 458 U.S. at 85, 102 S.Ct. at 2878 (Justice Brennan's emphasis).

Second, CFTC orders, like those of the agency in *Crowell* but unlike those of bankruptcy courts under the 1978 Act, are enforceable only by order of the district court. *See* 7 U.S.C. § 18(f); 458 U.S. at 85-86, 102 S.Ct. at 2878-79. Third, CFTC orders are reviewed under the same "weight of the evidence" standard sustained in *Crowell*, rather than the more deferential "clearly erroneous" standard found objectionable in *Northern Pipeline*. See 7 U.S.C. § 9; 458 U.S. at 85, 102 S.Ct. at 2878. Finally, the CFTC, unlike bankruptcy judges under the 1978 Act, does not exercise "all ordinary powers of district courts," including presiding over jury trials and issuing writs of habeas corpus. *See* 458 U.S. at 85, 102 S.Ct. at 2878.

These differences between the CFTC and 1978 Act bankruptcy judges do not, however, adequately assuage our doubts concerning the constitutionality of Commission Rule 12.23(b)(2). As discussed in the text, the Commission's composition and authority, established by the CEA, do not test well under the "adjunct" principles Justice Brennan stated and explained in *Northern Pipeline*.

holding of the Court. *See Gregg* v. *Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976) (plurality opinion) ("[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[ ] on the narrowest grounds . . .") *accord Marks* v. *United States*, 430 U.S. 188, 1983, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977); *United States* v. *Martino*, 664 F.2d 860, 872 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110, 102 S. Ct. 3493, 73 L.Ed.2d 1373 (1982); *McCormick* v. *Edwards*, 646 F.2d 173, 178 n. 11 (5th Cir.), *cert. denied*, 454 U.S. 1017, 102 S.Ct. 552, 70 L.Ed.2d 415 (1981) (all quoting *Gregg*).

Both Conti and the Commission stress language in Justice Rehnquist's concurrence limiting his agreement with the plurality to instances in which parties are deprived of an Article III forum against their will. *See* Conti Supplemental Brief at 3-4, 11 (quoting 458 U.S. at 91, 102 S.Ct. at 2881 (Rehnquist, J., concurring)).[25] Schor's decision to air his complaints of CEA and CFTC regulations violations before the Commission, respondents contend, constituted consent to CFTC adjudication of Conti's common law counterclaims. Schor could have secured an Article III tribunal's adjudication of Conti's breach of contract counterclaims, respondents suggest, by filing his own claims in federal court rather than with the Commission. *See* Conti Supplemental Brief at 2 & n. 1; Commission Supplemental Brief at 10-11. Some courts had held, at the time Schor initiated these proceedings, that the CEA established an implied federal right of action in district court for damages on behalf of defrauded commodity

[25] Justice Rehnquist stated that no earlier High Court decision elaborating upon Article III "has gone so far as to sanction the type of adjudication to which Marathon will be subjected *against its will* under the provisions of the 1978 Act." 458 U.S. at 91, 102 S.Ct. at 2881-82 (emphasis added). He limited his holding of unconstitutionality (and therefore the holding of the Court) to "so much of the Bankruptcy Act of 1978 as enables as a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection.*" *Id.* (emphasis added).

investors, *see, e.g., Hirk* v. *Agri-ReSearch Council, Inc.*, 561 F.2d 96, 103 n. 8 (7th Cir. 1977); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F.2d 129, 133 n. 7 (8th Cir. 1979) (dictum); the Supreme Court later reached the same conclusion in *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982) (5-4 decision). *But see infra*, p. 1276, note 27.

We return shortly to the character of Schor's alleged consent. *See infra* pp. 1276-77. At this juncture, we simply note that we do not share Conti's assurance that "[u]nder *Northern Pipeline* consent of the parties is sufficient to uphold the CFTC reparations procedure under Article III." Conti Supplemental Brief at 3. Justices Rehnquist and O'Connor limited their position to the case at hand—one in which a party was summoned before a non-Article III tribunal over its objection. *See* 458 U.S. at 91, 102 S.Ct. at 2881. Sensible interpretation of judicial opinions avoids converting a carefully crafted limitation on a holding into its *ratio decidendi*. The most we can fairly say of *Northern Pipeline* is that it provides no "determinative principle" for evaluating the constitutionality of non-Article III adjudicatory schemes that operate only with the litigants' consent. *See Wharton-Thomas* v. *United States*, 721 F.2d 922, 928 (3d Cir. 1983).

For guidance on the consent concept, we consider next several post-*Northern Pipeline* circuit court decisions determining the compatibility with Article III of the 1979 amendments to the Magistrates Act. The Federal Magistrates Act of 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643 (codified at 28 U.S.C. § 636(c) (1982)), allows a magistrate not enjoying Article III protections, with the consent of the parties, to try civil cases and enter final judgments. Six federal appeals courts have thus far upheld the constitutionality of that scheme: *Lehman Brothers Kuhn Loeb, Inc.* v. *Clark Oil Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (en banc); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc) "*Pacemaker*"); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983). No circuit has precedent to the contrary. However, the rulings on the constitutionality of the 1979 amendments to the Magistrate Act fail to alleviate our doubts concerning the constitutionality of CFTC jurisdiction over common law counterclaims for two reasons: those rulings rely on express consent, not consent by operation of law or agency rule; and they stress the control exercised over the magistrate by the district court.

The consent required for non-Article III adjudication under the Magistrates Act differs significantly from petitioners' putative consent to CFTC adjudication of Conti's counterclaims. Parties deciding whether to try their case before a magistrate or an Article III court exercise a relatively unfettered choice. Because litigant consent has been held "essential to the constitutionality of the [1979 Magistrates] Act," courts are "careful to guard against any compulsion to induce consent through the imposition of costs, delays, or other penalties." *Pacemaker*, 725 F.2d at 546.

We cannot say that Schor has manifested equally unburdened assent to CFTC jurisdiction over Conti's counterclaims. Far from expressly inviting Commission adjudication of the counterclaims, Schor forcefully argued, both before and after the ALJ's *Initial Decision*, that the Commission lacks statutory authority to award Conti breach of contract damages. *See* Complainants' Objections to Proposed Initial Decision at 2-4, *reprinted in* App. 859-61; Application of MSA for Commission Review of Initial Decision at 5-9, *reprinted in* App. 902-06.

Respondents maintain, in essence, that Schor and MSA have indirectly or implicitly consented to CFTC adjudication of Conti's counterclaims:

> The reparations complainant, by foregoing his right to proceed in federal or state court and electing to file a complaint with the Commission, consents by his conduct

> to Commission adjudication of his claim and any counterclaim arising from the same commodities transactions forming the basis of his complaint.

Commission Supplemental Brief at 11 (citation omitted); *see also* Conti Supplemental Brief at 2. Assuming arguendo that a party's consent is not only necessary but also sufficient to resolve Article III objections to a particular adjudicatory scheme—an issue we do not decide here[26]—Schor's submission to the CFTC's counterclaim adjudication was effected not by his affirmative choice but by operation of Commission rule. We see no indication in the Magistrates Act decisions that consent thus exacted avoids constitutional shoals. On the contrary, those decisions emphasize the importance of express, uncoerced consent. *See Collins*, 729 F.2d at 120; *Goldstein*, 728 F.2d at 35; *Pacemaker*, 725 F.2d at 543, 546; *Wharton-Thomas*, 721 F.2d at 926 & n. 7.

Commission Rule 12.23(b)(2) presents complainants positioned as Schor is with this choice: File a reparations complaint with the Commission and "consent" to relinquish the right to have an Article III tribunal adjudicate the broker's related common law claims; or forgo the congressionally-established right to a Commission determination of a reparations complaint in order to preserve Article III adjudication of any related state law claim the broker may assert.[27] This

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[26] *Compare* Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980) (consent insufficient), *with* McCabe, *The Federal Magistrate Act of 1979*, 16 HARV.J. ON LEGIS, 343 (1979), *and* Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U.L.Rev. 1297 (1975) (consent sufficient).

On the inadequacy of the Commission's and Conti's suggested analogy to arbitration, see *supra* p. 1274.

[27] Respondents overstate their case by suggesting that Schor had a clear choice between court and Commission. At the time Schor filed his complaints, the CEA contained no express provision for district court suits; such provision was first made in the

(footnote continued on next page)

is hardly the carefully guarded, cost-free consent the Ninth Circuit declared "essential to the constitutionality of the [Magistrates] Act." *Pacemaker*, 725 F.2d at 546.

The Magistrates Act decisions afford scant support for upholding Commission Rule 12.23(b)(2) for a second reason. The Magistrates Act cases do not hold, as respondent Conti intimates they do, *see* Conti Supplemental Brief at 3, that litigant consent is not only necessary, but also independently sufficient, to overcome Article III objections to magistrates' final adjudication of civil cases. Rather, the decisions upholding the constitutionality of the 1979 Magistrates Act focus additionally upon the control Article III district courts exercise over magistrates. *See Collins*, 729 F.2d at 114-15; *Goldstein*, 728 F.2d at 35, 36; *Pacemaker*, 725 F.2d at 540, 544-46; *Wharton-Thomas*, 721 F.2d at 926-27, 930.

(footnote continued from preceding page)

1982 amendments. *See* 7 U.S.C. § 25 (1982). While some lower federal courts had recognized a private right of action under the CEA prior to the filing of Schor's complaints, *see supra* p. 1275, the Supreme Court did not affirm that position until 1982, and then only by a 5-4 margin. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982).

Moreover, at least two federal district courts had ruled prior to the filing of Schor's reparations complaints that no implied private right of action existed under the CEA to redress alleged violations of its anti-fraud provisions. *Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979); *Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977). In brief, Schor confronted an area of law fairly described as unclear. *See Rivers* v. *Rosenthal & Co.*, 634 F.2d 774, 778 n. 7 (5th Cir. 1980) (summarizing holdings) *vacated and remanded*, 456 U.S. 968, 102 S.Ct. 2228, 72 L.Ed.2d 841 (1982). Respondents' contention that Schor implicitly consented to CFTC adjudication of Conti's counterclaims by foregoing his federal court forum is thus further weakened by the absence of a then-existing clearly established complainant's right to proceed in federal court.

The 1979 Magistrates Act retains in the district court two controls that *Northern Pipeline's* plurality considered central to the *Raddatz* holding. First, the 1979 amendments do not alter the method of magistrate appointment and removal; the judiciary, not the other branches of government, exercises control. *See supra* p. 1273. Second, the district courts under the 1979 Act control case references, as they did under the version of the Magistrates Act at issue in *Raddatz*. To conduct civil trials with the parties' consent, the magistrate must be "specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1) (1982). Moreover, even "specially designated" magistrates can be deprived of their jurisdiction in particular matters "for good cause shown on [the district court's] own motion, or under extraordinary circumstances shown by any party." *Id.* § 636(c)(6). The legislative history of the 1979 Magistrates Act indicates that "good cause" encompasses "any ... case containing sensitivities such that determination by an Article III judge is required to insure the appearance and reality of independence and impartiality in the decision." *Pacemaker*, 725 F.2d at 545 (citing S.Rep. No. 74, 96th Cong., 1st Sess. 14 (1979) (U.S. Code Cong. & Admin. News 1979, pp. 1469, 1483).

In sum, the Commodity Exchange Act, in contrast to the Magistrates Act, does not place the CFTC under the immediate and constant control of Article III judges. *See supra*, p. 1273. Moreover, the affirmative consent required under the Magistrates Act differs substantially from the consent exacted by CFTC rule; even if, under some circumstances, litigant consent alone may save an otherwise questionable adjudicatory scheme from constitutional attack, we do not believe petitioners' putative consent provides secure validation for the instant application of CFTC Rule 12.23(b)(2).

Serious constitutional problems thus attend CFTC adjudication of common law counterclaims. We have been well advised to avoid "needless determination of constitutional

issues ... if [a statute] is fairly susceptible of such a construction." *Ralpho* v. *Bell*, 569 F.2d 607, 619 (D.C. Cir. 1977) (footnotes omitted); *accord Lynch* v. *Overholser*, 369 U.S. 705, 710-11, 82 S.Ct. 1063, 1067-68, 8 L.Ed.2d 211 (1962); *International Association of Machinists* v. *Street*, 367 U.S. 740, 749, 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961). The Commodity Exchange Act "is fairly susceptible of [an alternative] construction" free from Article III objections: Counterclaims can be limited, as claims are, *see* 7 U.S.C. § 18(a), to those arising under the CEA or substantive CFTC regulations.

B. The CEA and Its Legislative History

Conti and the CFTC tender several arguments for interpreting the Act to validate Commission Rule 12.23(b)(2). None of their points, taken singly or in combination, convinces us that Congress had a firm intention regarding CFTC jurisdiction over common law counterclaims. In the absence of a clear expression of legislative will, we adopt the construction of the Act that avoids significant constitutional questions.

The Commodity Exchange Act, as it existed at the time of Schor's trading and the ALJ's *Initial Decision*,[28] contained only one reference to counterclaims. Section 14(d) of the CEA directed that complainants not residing in the United States, "before any formal action [would be] taken on [their] complaint,"

> furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent.

7 U.S.C. § 18(d) (emphasis added). Conti seems to suggest that the quoted section 14(d) language demonstrates congressional recognition of the prospect of counterclaims, and

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[28] *See supra* note 1.

therefore supports its view of the Commission's counterclaim jurisdiction. *See* Conti Brief at 13. We perceive no clear indication from this section of anything but congressional concern that nonresidents seeking judicial review of adverse Commission reparations awards provide security to protect the respondent. Congress might have contemplated counterclaims only against nonresident complainants, counterclaims against all complainants, counterclaims unlimited in scope, or counterclaims of a narrow compass. In short, we cannot derive the meaning Conti presses from the cryptic 14(d) statement.

While counterclaims were explicitly mentioned only in section 14(d) of the CEA, Conti maintains that other sections implicitly evidenced a congressional intention to permit CFTC adjudication of common law counterclaims. Conti points to section 14(f), which stated that "*any person* for whose benefit [a reparation award] was made" may enforce the judgment in district court, 7 U.S.C. § 18(f) (emphasis added), and to section 14(g), which stated the conditions entitling "*any party* aggrieved [by a Commission order]" to obtain court of appeals review, *id.* § 18(g) (emphasis added). Conti argues that these statutory references to "any person" and "any party," rather than to "respondent," "reflected congressional intent that both commodity professionals and customers could receive reparations awards." Conti Brief at 13; *see also* Commission Brief at 17.

Conti's argument, although plausible, is not compelling. Schor's interpretation of the same statutory language is also sensible; he contends that Congress authorized Commission jurisdiction only over counterclaims alleging a violation of the Act or Commission regulations. Petitioners' Brief at 28; *see* 40 Fed. Reg. 55,666, 55,667 (Dec. 1, 1975) (Commission's *proposed* counterclaim rule adopting same view of CFTC jurisdiction). Under Schor's construction of the Act, the "any person"/"any party" language in sections 14(f) and (g) accommodates the possibility of a dispute between brokers in which both the main claim and the counterclaim charge

violations of the CEA or CFTC regulations. Again, we discern no bright signal of the congressional design in the cited sections.

The Commission asserts that courts owe substantial deference to its counterclaim rule as an agency interpretation of its governing statute. Commission Brief at 20 (citing *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961)). We disagree. Courts generally accord respectful consideration to the interpretation placed upon a statute by an agency charged with its administration. *See, e.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974). When "an agency construes its charter erratically or inconsistently, however, little or no deference will be owed to its decisions." *AFGE* v. *FLRA*, 712 F.2d 640, 643, n. 17 (D.C. Cir. 1983) (citations omitted); *see, e.g., North Haven Board of Education* v. *Bell*, 456 U.S. 512, 522 n. 12, 102 S.Ct. 1912, 1918 n. 12, 72 L.Ed.2d 299 (1982); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n. 11, 99 S.Ct. 2361, 2369 n. 11, 60 L.Ed.2d 980 (1979). The CFTC has not maintained a consistent position on the scope of its authority to adjudicate counterclaims. Moreover, the question before us is not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, has superior expertise.

The Commission's view of its counterclaim jurisdiction has shifted. The CFTC's first proposed reparations rules would have permitted counterclaims only "if the facts set forth . . . allege a violation which would be a proper subject of a reparation complaint." 40 Fed. Reg. 55,666, 55,667 (Dec. 1, 1975). This proposed counterclaim rule, the Commission acknowledged, was "extremely narrow"; however, a "substantial question" existed, the CFTC noted, concerning its statutory authority to permit reparation awards "based on matters other than alleged violations by a registrant." *Id.* In response to industry comment, the Commission amended its initially proposed rule to permit all counterclaims arising

out of the transactions or occurrences set forth in the complaint. *See* 41 Fed. Reg. 3994, 3995 (Jan. 27, 1976). The CFTC's own recognition that the scope of its statutory authority to adjudicate counterclaims was not crystalline, and its shift from one position to another, "substantially diminish[ ] the deference [owed its] present interpretation of the statute." *Southeastern* Community College v. *Davis*, 442 U.S. 397, 411 n. 11, 99 S.Ct. 2361, 2370 n. 11, 60 L.Ed.2d 980 (1979) (citing *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1976)).[29]

Furthermore, the deference due an agency's interpretation of its governing statute "is more emphatically summoned when the question is one requiring [administrative] expertise in the subject area." *Sea-Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 780 n. 15 (D.C. Cir. 1977) (Robinson, J., dissenting); *accord Wilderness Society v. Morton*, 479 F.2d 842, 866 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1973). Commission Rule 12.23(b)(2) does not "concern [ ] matters within the agency's expertise." *Adkins* v. *Hampton*, 586 F.2d 1070, 1073 (5th Cir. 1978) (footnote omitted). On the contrary, the statutory interpretation-jurisdictional question presented is precisely the kind with which courts customarily deal. *See, e.g. Allied Van Lines, Inc.* v. *ICC*, 708 F.2d 297, 300 (7th Cir. 1983) ("question of jurisdiction is plainly not a matter within the Commission's discretion or expertise") (citation omitted); *Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413, 1423 (D.C. Cir. 1983) ("quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority") (footnote omitted); *Office of Consumers' Counsel* v. *FERC*, 655 F.2d 1132, 1141 (D.C. Cir. 1980). Accordingly, the

[29] We note that the Commission remains ambivalent on the question whether, once a broker files a common law counterclaim, the customer may add to the reparations complaint related claims arising under state law. *See* Commission Supplemental Brief at 18 n. 14.

court's role in determining the issue at hand "should . . . be viewed hospitably." *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14, 88 S.Ct. 651, 658, 19 L.Ed.2d 787 (1968) (Harlan, J., dissenting).

Conti and the Commission additionally argue that Congress tacitly approved the Commission's current position when it amended the CEA without countermanding the CFTC's counterclaim rule. *See* Conti Brief at 16; Commission Brief at 22. This point merits consideration,[30] but the notion that Congress effectively adopts all agency regulations it does not alter pushes too far. Placing inordinate emphasis on "congressional silence" can be "treacherous." *Girouard* v. *United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 829, 90 L.Ed. 1084 (1946); *see also NLRB* v. Bell Aerospace Co., 416 U.S. 267, 310, 94 S.Ct. 1757, 1779, 40 L.Ed.2d 134 (1974) (White, J., dissenting in part) ("Congressional silence does not imply legislative approval of all [agency] rulings theretofore made."); *Helvering* v. *Hallock*, 309 U.S. 106, 119-20, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.") (footnote omitted). Congress is not obliged to "correct each mistaken [administrative] construction under penalty of incorporating it into the fabric of the statute." *F.W. Woolworth Co.* v. *United States*, 91 F.2d 973, 976 (2d Cir. 1937) (L. Hand, J.), *cert. denied*, 302 U.S. 768, 58 S.Ct. 479, 481, 82 L.Ed. 597 (1938). When Congress amends a law without addressing extant administrative rulings, its "failure to take action . . . is subject to more than one interpretation." *Chisholm* v. *FCC*, 538 F.2d 349, 363 (D.C. Cir.), *cert. denied*, 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976). Especially in light of the serious constitutional questions

[30] *See, e.g., Grove City College* v. *Bell*, — U.S. —, —, 104 S.Ct. 1211, 1219, 79 L.Ed.2d 516 (1984); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 1925, 72 L.Ed.2d 299 (1982) (citations omitted); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 & n. 66, 102 S.Ct. 1825, 1840-41 & n. 66, 72 L.Ed.2d 182 (1982) (citations omitted).

attending Commission jurisdiction over common law counterclaims, we resist reading congressional silence as signalling the legislature's advertence to, and approval of, Commission Rule 12.23(b)(2).

From fragments of legislative history and the most recent CEA amendments, respondents discern a marked congressional intent to entrust to the Commission broad discretion to define its own counterclaim jurisdiction. First, Conti and the Commission cite a 1974 House Committee Report which stated that "[c]ounterclaims will be recognized in the proceedings...on such terms and under such circumstances as the Commission may prescribe by regulation." H.R.Rep. No. 975, 93d Cong., 2d Sess. 23 (1974), *cited in* Conti Brief at 14-15 and Commission Brief at 18-19. Next, respondents emphasize the latest amendments to the CEA, effective since May 1983.[31] Newly enacted section 14(b) provides, in part, that "[t]he Commission may promulgate...rules, regulations, and orders...[which] may prescribe...the nature and scope of...counterclaims." 7 U.S.C. § 18(b) (1982). Even if not directly operative in the Schor-Conti dispute, respondents maintain, current section 14(b) confirms the intention of Congress all along to allow the Commission to delineate the scope of its counterclaim authority. *See* Conti Brief at 16; Commission Brief at 2.

Reading only the words respondents stress, one might conclude that Congress has indeed left the Commission at liberty to write its own counterclaim jurisdictional ticket. But even in the absence of any constitutional question, it would be extraordinary for a legislature to deliver such a blank check to an administrative tribunal. Both at argument and on brief, the CFTC stated that it "is not aware of any other agencies that expressly render decisions and issue awards on common law claims." Commission Supplemental Brief at 16 n. 13. Conti noted that the CFTC's asserted common law counterclaim jurisdiction "may be unique in the

[31] *See supra*, p. 1264, note 1.

federal system." Conti Supplemental Brief at 20 n. 10. Our independent research has also failed to locate precedent for Commission Rule 12.23(b)(2).

Nothing we or the parties have uncovered suggests that Congress meant to confer upon the Commission unprecedented authority. *Cf.* 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 53.01, at 343 (4th ed. 1972) (presumption in favor of legislative regularity). And there is not even a hint that Congress was alerted to, or in any way considered, the Article III problem that pervades our review of the Commission's assertion of jurisdiction to adjudicate common law counterclaims. *See Shrader* v. *Harris*, 631 F.2d 297, 301-02 (4th Cir. 1980) (refusing to construe statute to raise constitutional questions [i]n the absence of any manifestation of congressional consideration of th[e] problem [before the court]").

In sum, neither Congress nor the CFTC appears to have considered the serious constitutional questions provoked by Commission adjudication of common law counterclaims. The language and legislative history of the CEA contain no clear expression of congressional intent to commit to the Commission extraordinary adjudicatory authority—subject matter competence not exercised by any other federal agency. Considerations of legislative regularity, administrative uniformity, and, most prominently, Article III constraints, impel us to construe the Act to authorize the CFTC to adjudicate only those counterclaims alleging violations of the Act or Commission regulations. *See generally NLRB* v. *Catholic Bishop*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (construing statute to deny NLRB authority to exercise jurisdiction over lay teachers in parochial schools, in part because contrary holding would raise serious questions under the religion clauses of the First Amendment); *International Association of Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (construing Railway Labor Act to deny unions, over an employee's objection, power to use the

objecting employee's compulsory union dues to support political causes employee opposes, in part because contrary holding would raise serious First Amendment questions); *Miller* v. *United States*, 620 F.2d 812 (Ct. Cl. 1980) (holding statutory provision setting 6% interest rate for government takings not binding on judiciary, in part because contrary holding would raise serious Fifth Amendment just compensation questions); *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811 (D.C. Cir. 1974) (holding statutory amendment prohibiting judicial review of VA benefit termination inapplicable retroactively to final, unappealed district court judgment ordering benefit restoration, in part because contrary holding would raise serious due process questions).

CONCLUSION

We affirm the ALJ's dismissal of Schor's complaints except with regard to the "trading ahead" allegation; on that matter, we vacate the ALJ's decision and remand to the Commission for its initial consideration. We reverse the ALJ's judgment in favor of Conti on its counterclaims and remand with instructions to dismiss the counterclaims for lack of Commission jurisdiction.

It is so ordered.

APPENDIX C
(Order Denying Rehearing and Dissenting Statement)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1703 **September Term, 1984**

William T. Schor,
Petitioner,

v.

Commodity Futures Trading Commission,
and ContiCommodity Services, Inc.,
and Richard L. Sandor,
Respondents.

And Consolidated Case No. 83-1704

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The Suggestions for Rehearing *en banc* of the Commodity Futures Trading Commission and ContiCommodity Services, Inc., filed September 24, 1984, have been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor of either. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the aforesaid Suggestions are denied.

Per Curiam
For the Court:
GEORGE A. FISHER, *Clerk*

BY:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Wald and Starr would grant the suggestions for rehearing *en banc*. A statement of Circuit Judge Wald, concurred in by Circuit Judge Starr, is attached.

Statement of Judge Wald, concurred in by Judge Starr:

I would hear this case en banc because it results in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act ("CFTA") violations. The reparations provision has, since 1974, provided an administrative forum as an alternative to the courts for such victims to recover their losses. As a practically necessary corollary, it empowers the agency to decide counterclaims arising out of the transactions complained of and affecting the account from which the reparations will be paid. To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense in the fast-moving money world and will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims. The faster and less expensive alternative forum will be decimated.

The panel reasoned that, because Congress did not explicitly discuss the Article III issues raised by *Northern Pipeline* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1981), during its deliberations in 1974 (pre-*Marathon*) and 1982 (post-*Marathon*), it could not have meant to give the Commodity Futures Trading Commission ("CFTC") jurisdiction over common law-type counterclaims. But there is no doubt that at both times, and especially in 1982, Congress *expressly* meant to convey such jurisdiction. *See, e.g.*, H.R. Rep. No. 975, 93rd Cong. 2d Sess. 23 (1974); H.R. Rep. No. 565 97th Cong., 2d Sess. 55 (1982). To suggest otherwise is to blink reality. In fact, the 1982 Congress that explicitly extended counterclaim jurisdiction to the CFTC simultaneously considered a wealth of bankruptcy proposals in the aftermath of *Marathon*. *See, e.g.*, King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline* v. *Marathon*, 40 Wash. & Lee L. Rev. 99

(1983). Thus its ignorance of the Article III issue is hardly to be presumed.

In the face of this clear congressional intent to include all counterclaims arising from the same transaction in administrative reparations proceedings, this court should squarely face the issue of whether such a statutorily crafted scheme is unconstitutional. I hesitate to say yes in view of the "somewhat dense history of [this] constitutional quandry." *Marathon*, 458 U.S. at 112 (White, J., dissenting). Indeed, admission to the CFTC adminstrative forum is by *choice* of the complainant; jurisdiction over common law claims comes only by way of counterclaims arising out of the main reparations claim based on the federal violation. *Cf. Crowell* v. *Benson*, 285 U.S. 22 (1932). Petitioners to the CFTC forum, like Schor, plainly take notice of the counterclaim risk. Moreover, CFTC petitioners presently enjoy a private right of action under the CFTA in federal courts. The choice of an alternative forum—here the CFTC—might well constitute litigant consent sufficient to raise a significant argument that the CFTC is constitutional. *See Federal Magistrates and the Principles of Article III*, 97 Harv. L. Rev. 1947, 1952-54 (1984) (noting that the Court intended that consent may be relevant in determining whether Article III has been violated).

In sum, this is, so far as I know, the first major extension of *Marathon* to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas. I believe the case deserves *en banc* consideration.

APPENDIX D
(Order Granting Certiorari and
Remanding to Court of Appeals)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

July 2, 1985

Mr. Robert L. Byman
Jenner & Block
One IBM Plaza
Chicago, IL 60611

Re: ContiCommodity Services, Inc.,
v. William T. Schor, et al
No. 84-1500
Commodity Futures Trading Commission
v. William T. Schor, et al.
No. 84-1519

Dear Mr. Byman:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Thomas, Administrator, EPA* v. *Union Carbide*, 473 U.S. — (1985).

Very truly yours,

Alexander L. Stevas, Clerk

APPENDIX E

(Opinion on Remand)

E-1

William T. SCHOR, Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,

and

ContiCommodity Services, Inc.

and

Richard L. Sandor, Respondents.

MORTGAGE SERVICES OF AMERICA, Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,

and

ContiCommodity Services, Inc.

and

Richard L. Sandor, Respondents.

Nos. 83-1703, 83-1704.

United States Court of Appeals,
District of Columbia Circuit.

Aug. 13, 1985.

Petitions for Review of an Order of the Commodity Futures Trading Commission.

Before GINSBURG, Circuit Judge, MacKINNON, Senior Circuit Judge, and PARKER*, United States District Judge for the District of Columbia.

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Opinion PER CURIAM.

PER CURIAM:

In *Schor* v. *Commodity Futures Trading Commission*, 740 F.2d 1262 (D.C. Cir. 1984), we concluded that the Commodity Exchange Act (CEA or Act)[1] did not empower the Commodity Futures Trading Commission (CFTC or Commission) to adjudicate traditional contract claims governed by state law. In particular, *Schor* entailed two matters: first, a customer's charges that a broker had violated the CEA and CFTC regulations thereunder; and second, a counterclaim by the broker for the debit balance in the customer's account. With one exception, we affirmed the CFTC's dismissal of the customer's charges. We held, however, that Congress had not authorized the Commission to entertain claims or counterclaims other than those alleging violations of the Act or CFTC regulations.[2] Accordingly, we instructed the Commission to dismiss the broker's common law breach of contract counterclaim for want of subject matter jurisdiction.

[1] 7 U.S.C. §§ 1-22 (1976). *Schor* was governed by the Act as it was amended in 1974. *See* Commodity Futures Trading Commission Act of 1974, Pub.L. No. 93-463, 88 Stat. 1389. Congress further revised the Act in 1983. *See* Futures Trading Act of 1982, Pub.L., No. 97-444, 96 Stat. 2294 (1983). The latter revision became effective in May 1983; it was not in force in 1980 and 1981 when this case was heard and decided by an administrative law judge (ALJ). *See Schor* v. *Commodity Futures Trading Comm'n*, 740 F.2d 1262, 1264-65 & n. 1 (D.C.Cir. 1984).

[2] We noted that, at the time of Schor's trading and the ALJ's decision, *see supra* note 1, the Act contained only one reference to counterclaims—in a subsection then dealing solely with the bond required of complainants not residing in the United States. 740 F.2d at 1278. We further observed that in the most recent revision of the CEA, Congress, while not itself prescribing the content of counterclaims, provided that " '[t]he Commission may promulgate . . . rules, regulations, and orders . . .

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On July 2, 1985, the Supreme Court vacated our judgment in *Schor* and "remanded for further consideration in light of *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. , 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)." Upon further consideration, we reinstate our judgment in *Schor*.

Thomas v. *Union Carbide Agricultural Products Co.*, 473 U.S. , 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985), involved a pesticide registration scheme precisely and completely ordered by Congress in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982 & Supp. I 1983). As a means of resolving certain disputes among registrants regarding compensation for which FIFRA provided, Congress crafted a binding arbitration arrangement with limited judicial review. 473 U.S. , 105 S.Ct. at 3329. The Supreme Court held that Article III of the Constitution did not prohibit Congress from employing a binding arbitration mechanism in the federal regulatory regime. Distinguishing *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct 2858, 73 L.Ed.2d 598 (1982), the Court in *Thomas* heavily emphasized that the FIFRA case arose entirely within the confines of federal law, and that a federal rule of decision, exclusively, was at stake.[3]

We note in addition that in *Thomas*, there was no doubt as to the legislature's will. Congress had furnished a detailed design. *See* 473 U.S. at , 105 S.Ct. at 3329. The Court's task was not to divine what FIFRA meant, for the statute, on the

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[which] may prescribe . . . the nature and scope of . . . counterclaims.' 7 U.S.C. § 18(b) (1982)." 740 F.2d at 1280.

[3] Observing that "federal law supplies the rule of decision," 473 U.S. at , 105 S.Ct at 3335, the Court clarified, correlatively, that the claims presented in *Thomas* for compensation under FIFRA were not a "matter of state law," and "[did] not depend on or replace a right to . . . compensation under state law." *Id.; see also id.* at , 105 S.Ct. at 3341 (Brennan, J., concurring in the judgment) (*Thomas* arises entirely within the confines of the FIFRA).

matter at issue, appeared entirely clear.[4] *Thomas* thus presented, cleanly, a question of the compatibility of the scheme Congress crafted with Article III constraints on the lawmaker.[5]

Because the dispute in *Thomas* arose "in the context of a federal regulatory scheme that virtually occupie[d] the field,"[6] we are unable to find in that case reasoning that would lead us to a different result in *Schor*. The broker's common law counterclaim in *Schor*, in marked contrast to the compensation controversy in *Thomas*, entailed no claim "created by the administrative state";[7] indeed, the plea for the debit balance in the customer's account did not stem from any law prescribed by Congress. Rather, "state law, created the [contract] right and provided the rule of decision as between [broker and customer], irrespective of the existence of the [CEA]."[8] In sum, the *Schor* counterclaim presented, as the *Thomas* dispute did not, "a traditional contract action,"[9] a garden variety matter of state common law.

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[4]The Court pointed out that Congress had deliberately crafted the right and "select[ed] arbitration as the appropriate method of dispute resolution" in response to "the danger to public health of further delay in pesticide registration." 473 U.S. at , 105 S.Ct. at 3338.

[5]The federal "nature of the right at issue" was plain, as were "the concerns motivating the legislature." 473 U.S. at , 105 S.Ct. at 3338.

[6]473 U.S. at , 105 S.Ct. at 3343 (Brennan, J., concurring in the judgment).

[7]*See* 473 U.S. at , 105 S.Ct. at 3334 (citing Monaghan, Marbury *and the Administrative State*, 83 COLUM.L.REV. 1 (1983)).

[8]*See* 473 U.S. at , 105 S.Ct. at 3342 (Brennan, J., concurring in the judgment).

[9]*See* 473 U.S. at , 105 S.Ct. at 3335 *(Northern Pipeline* held "that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law,

(footnote continued on next page)

Moreover, the CFTC's asserted authority to adjudicate a common law counterclaim derived from a Commission procedural rule, not from any explicit instruction stated by Congress in the text of the CEA. As we pointed out in our *Schor* opinion, the Commission urged jurisdiction apparently "unique in the federal system."[10] However swift and economical Commission adjudication might be, neither the CFTC nor this court was "aware of any other agenc[y] that expressly render[s] decisions and issue[s] awards on common law claims."[11] If Congress had meant to confer upon the CFTC such unprecedented authority, some clear words to that effect, it seemed to us, would have been spoken in legislative chambers, and written into the statute as a direction for the Commission and the courts.[12]

We recognized in *Schor* that the Article III inquiry made in *Northern Pipeline* involved examination of decisions that "do not admit of easy synthesis."[13] Because Congress had not addressed the matter of the CFTC's authority over state

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without consent of the litigants, and subject only to ordinary appellate review").

[10]740 F.2d at 1280 (quoting Supplemental Brief of ContiCommodity Services, Inc. at 20 n. 10). The CFTC had initially proposed a counterclaim rule limited to pleas based on alleged violations of the CEA or its implementing regulations. The Commission did so because it thought a "substantial question" existed concerning its authority to make awards on matters other than CEA infractions. *See* 740 F.2d at 1279.

[11]740 F.2d at 1280 (quoting Supplemental Brief of CFTC at 16 n. 13).

[12]Congress, had it envisoned CFTC jurisdiction over common law contract claims, might have considered whether judicial review should be encumbered, as it is under the CEA, by the requirement of an appeal bond in double the amount awarded by the Commission. *See* 740 F.2d at 1266 n. 9.

[13]740 F.2d at 1269 (quoting *Northern Pipeline,* 458 U.S. at 91, 102 S.Ct. at 2881 (Rehnquist, J., concurring in the judgment)).

common law claims specifically, if at all, we construed the CEA in a manner that avoided the constitutional issue.[14] We understand the CFTC's argument that comprehensive Commission jurisdiction would be highly efficient. We remain persuaded, however, that the matter is one properly placed—forthrightly, fully, and in the first instance—before Congress. Nothing in the *Thomas* decision alters our view in that regard.[15] We therefore reinstate our judgment.

It is so ordered.

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[14] 740 F.2d at 1269, 1281. In this, we followed principles of interpretation set out by Justice Brandeis in *Ashwander* v. *TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring), and regularly adhered to by the federal courts. *See, e.g., NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-01, 99 S.Ct. 1313, 1318-19, 59 L.Ed.2d 533 (1979).

[15] Our decision in *Schor* was made in the light of supplementary briefing that comprehensively aired the parties' positions. *See* 740 F.2d at 1269 & nn. 17-18. The Commission and the broker rehearsed those arguments again in petitions for rehearing. Because we find the distinctions between *Thomas* and *Schor* so sharp—based on the federal source of the governing law in *Thomas* and the state source in *Schor*, as well as on the clear blueprint Congress drew for *Thomas* but not for *Schor*—we did not call for yet another round of briefing in our court. In our view, ultimate resolution of this controversy should not be detained by another stop in a forum not positioned to modify or elaborate further on the holding in *Northern Pipeline*.

APPENDIX F

(Judgment Order on Remand)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1703 September Term, 1984

William T. Schor,

Petitioner,

v.

Commodity Futures Trading Commission,
and ContiCommodity Services, Inc.,
and Richard L. Sandor,

Respondents.

No. 83-1704

Mortgage Services of America,

Petitioner,

v.

Commodity Futures Trading Commission,
and ContiCommodity Services, Inc.,
and Richard L. Sandor,

Respondents.

PETITIONS FOR REVIEW OF AN ORDER OF THE
COMMODITY FUTURES TRADING COMMISSION

Before: GINSBURG, Circuit Judge,
MacKINNON, Senior Circuit
Judge, and PARKER,*
United States District Judge
for the District of Columbia.

ORDER

These causes originally came on to be heard on petitions for review of an order of the Commodity Futures Trading Commission and they were argued by counsel. Thereafter this Court, on August 10, 1984, entered a judgment which affirmed, in part, and reversed, in part, the order on review herein, and remanded these cases to the Commission for further proceedings. The opinion of this Court was published at 740 F.2d 1262. Thereafter, the Supreme Court of the United States granted a writ of certiorari and, on July 2, 1985, vacated our judgment and remanded this case to this Court for further consideration. Having considered the opinion of the Supreme Court and the record and briefs herein, it is

ORDERED, by the Court, that this Court's August 10, 1984, judgment, which affirmed, in part, the order of the Commodity Futures Trading Commission under review, reversed it in part, and remanded these cases to the Commission for further consideration, is hereby reinstated, for the reasons set forth in an Opinion for the Court filed herein this date. The Clerk shall reinstate this Court's Judgment herein, dated August 10, 1984, as of the present date and shall note the docket accordingly.

Per Curiam
For The Court

GEORGE A. FISHER, *Clerk*

Date: August 13, 1985
Opinion Per Curiam.
** Sitting by designation pursuant to 28 U.S.C. § 292(a).*

APPENDIX G

(Administrative Law Judge Opinion; Unreported)

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

MORTGAGE SERVICES OF AMERICA and WILLIAM T. SCHOR, Complainants v. CONTICOMMODITY SERVICES, INC. and RICHARD L. SANDOR, Respondents	CFTC Docket No. R 80-566-80-723

INITIAL DECISION

BEFORE: PAINTER, ALJ

Preliminary Statement:

Complainants Mortgage Services of America ("MSA") and William T. Schor initiated this proceeding by filing reparations complaints on February 21, 1980. Complainants allege that respondents refused to execute orders placed by complainants on October 8, 1979, and that respondents allowed unsuitable trading, gave fraudulent advice, and committed other violations of the Commodity Exchange Act and the Commission's regulations, causing total damages of approximately $1.8 million.

Respondents filed a timely answer and counterclaim, denying all of the alleged violations and asserting a claim for account deficits totalling $92,349.37.

The trial in this matter took place in Washington, D.C. on March 16, 17, and 18, 1981. Post hearing, the parties filed briefs, including proposed findings of fact and conclusions of law. By Order issued August 25, 1981, respondents were directed to file a proposed order consistent with the findings and conclusions set forth in their post-hearing briefs but

excluding any award of attorney fees. Complainants were given an opportunity to file objections to any proposed order on or before October 15, 1981. Complainants did not file timely objections. However, complainants did file objections out of time, and for purposes of this proceeding, the objections are deemed to have been timely filed.

In objections to the proposed order filed by respondents, complainants contend that it was improper to permit respondents to file a proposed order. I disagree. The gut issue in this case is whether Conti personnel failed or refused to accept and execute orders as directed by William Schor. There is not a shred of probative evidence in the record to suggest that Conti deliberately, negligently, or otherwise failed to accept and act upon directions given by complainants. A secondary issue is whether complainants were suited to trading futures contracts. Again, there is nothing in the record to show that respondents violated any suitability rule in dealing with complainants. Under these circumstances, I find the directive that respondents prepare a proposed order appropriate.

Findings of Fact:

1. Complainant William Schor is a mature, intelligent individual and is the president of complainant MSA, a mortgage banking company. He has had eighteen years experience in the mortgage banking business. (Tr. 109, 145). Prior to opening his account with respondent ContiCommodity Services, Inc. ("Conti"), Schor had substantial experience in trading GNMA and other financial futures through Hornblower & Weeks and Merrill Lynch. (Tr. 145; Resp. Ex. 16). After opening accounts with respondent Conti, and during the time he traded the Conti accounts, Schor also traded financial futures with another futures commission merchant, Stotler and Co. (Tr. 145; Resp. Ex. 12, 13).

2. Complainant MSA is 90 percent owned by complainant Schor. (Tr. 109). Complainant Schor personally handled

all of the financial futures trading for accounts of MSA. (Tr. 15, 165).

3. Respondent Conti is a futures commission merchant registered with the Commission.

4. Respondent Richard L. Sandor is vice-president of Conti and head of a Conti division specializing in the trading of financial futures.

5. Complainants Schor and MSA opened accounts at Conti, through Sandor, on September 2, 1976, and thereafter engaged in a number of trades in the accounts. (Tr. 46).

6. At the time complainants opened their accounts with Conti, complainant Schor had a personal net worth of $235,000, not counting his 90 percent ownership of complainant MSA. (Tr. 146).

7. By 1978, the net worth of MSA was also $235,000 (Tr. 148), and on October 1, 1979, it was approximately $271,000 (Tr. 113), giving complainants a combined net worth substantially in excess of $400,000 during 1979.

8 Complainant Schor's annual salary in 1978 and 1979 was $50,000, and in each year he received other benefits worth $10,000 to $15,000 and a bonus of approximately $25,000. (Schor Dep. 143-45). Complainant MSA enjoyed gross profits of over $1,000,000 in 1978 (Schor Dep. 136), and showed a relatively small pre-tax loss in 1979 due only to the trading losses it experienced in the futures market (Schor Dep. 141-42).

9. Respondent Sandor had ample basis for considering complainant Schor financially secure and knowledgeable about both the mortgage banking business and the GNMA future market. (Tr. 293-94).

10. As of Monday, October 8, 1979, the accounts traded by complainant Schor with respondent Conti had a net position of 25 contracts long in GNMA futures traded on the Chicago Board of Trade ("CBT"), and 10 contracts long in

GNMA futures traded on the American Commodity Exchange ("ACE"). As of the same date, accounts traded by complainant Schor at Stotler had a net position of 10 contracts long in CBT GNMA futures. (Tr. 153; Compl. Ex 8, 9; Resp. Ex. 12, 13).

11. Complainant Schor had entered into the net long positions at Conti several months prior to October 8, 1979, and prior to October 8, these positions had incurred substantial declines in equity. (Compl. Ex. 6, 7, 8, 9).

12. On Saturday, October 6, 1979, the Federal Reserve Board announced a number of decisions designed to strengthen the dollar. (Tr. 268). There was no consensus among financial traders as to the impact these decisions would have of the price of financial futures. (Tr. 268-69, 295-96).

13. During the morning of October 8, 1979, complainant Schor placed a series of telephone calls to personnel of respondent Conti concerning his account and that of MSA. (Tr. 121-30, 232-35, 259-265; Resp. Ex. 1, 2).

14. At the time Schor initiated his conversations with Conti personnel, he was considering a plan to reduce his risk by short selling, but he did not know what positions were held in the complainants' accounts at Conti. (Tr. 152, 156-57). Conti had provided Schor with regular account statements reflecting this information (Compl. Ex. 1, 2), and these statements were readily accessible to Schor on October 8. (Tr. 157).

15. In telephoning Conti, Schor initially wanted to consult with respondent Sandor, who was out of the office that day. (Tr. 121). In Sandor's absence, Schor spoke at different times to three Conti account executives, John Richards on the CBT (Tr. 259-65), and James Criswell (Resp. Ex. 1), and James Rutgers (Resp. Ex. 2) on the ACE. Schor also spoke on two occasions to Kathy Lynn Minervino, the operations supervisor for Conti's financial division. (Tr. 230, 232-35).

16. In his conversations with account executives, Schor repeatedly asked for market information (Tr. 260, 262; Resp.

Ex. 1, 2), and at one point asked James Criswell to trade for him on a discretionary basis, which Criswell declined to do. (Resp. Ex. 1, 2). However, Schor did not, in any of his conversations with Conti personnel on October 8, 1979, give directions to place a specific order. (Tr. 157, 263). Schor likewise placed no orders in the complainants' accounts at Stotler on October 8. (Tr. 158).

17. Throughout the conversations between Schor and Conti account executives on October 8, Conti personnel were available for executing selling orders from Schor, were willing to place such orders for him, and repeatedly asked if Schor wished to place an order. (Tr. 262-63; Resp. Ex. 1, 2).

18. No Conti account executive told Schor that the CBT markets were "locked" limit down, so that trading was impossible. (Tr. 264-65). Schor chose not to place short orders on October 8, because he did not wish to sell at the prevailing market prices. (Tr. 263; Resp. Ex. 1, 2).

19. At the time that complainants Schor and MSA opened their accounts at Conti, Section 1.55 of the Commission's regulations was not in effect.

20. Complainants Schor and MSA have demonstrated no failure on the part of respondents to disclose any relevant risk to them.

21. Respondent Sandor made no representation to complainants that the market price for GNMA futures would not fall below a certain level.

22. In the customer agreements entered into by complainants with respondent Conti, they agreed to keep their accounts fully margined at all times and to pay promptly on demand any deficits in their accounts, together with interest and all costs of collection, including attorneys' fees. (Resp. Ex. 4, 5, ¶¶3, 4).

23. On October 9, complainants' accounts were undermargined; complainant Schor informed respondents that complainants could not make further margin deposits to

their accounts, and therefore respondents liquidated the accounts pursuant to the customer agreements. (Tr. 301-02).

24. After liquidation, there remained deficits in the amount of $55,955.60 in the MSA account, and $36,393.77 in the Schor account. (Resp. Ex. 6, 7). Complainants refused demands from respondents to pay the amount of the deficit, and these amounts remain owing. (Resp. Ex. 8).

Discussion:

The allegations made by complainants fall into two categories. First, they allege that Conti personnel failed to execute selling orders that complainant Schor attempted to place on October 8, 1979. On the basis of this factual allegation, complainants allege fraud, improper supervision of employees, and bucketing. Respondents deny that Schor ever attempted to place orders on October 8. The allegation thus essentially presents a credibility question. I have found respondents' position more credible based on my assessment of the demeanor of the witnesses and on the following considerations:

1. Schor testified that he was falsely informed by John Richards that all trading in FNMA futures had ceased during the early morning of October 8, so that no trades could be made. Schor testified that, based on this advice, he determined not to place orders anywhere on October 8, and so did not telephone his broker at Stotler. Yet a telephone bill produced at the hearing showed that Schor did telephone his Stotler broker during the trading hours on the afternoon of October 8.

2. Schor failed to place selling orders either at Stotler or Conti during trading hours on October 9, even though nothing allegedly told him by Conti personnel would have indicated that such trades could not be made.

3. When Schor wrote to Conti on October 23, 1979, to indicate that he would not pay the deficit in his account, he made no mention of any false statements by Conti personnel that GNMA trading had ceased on October 8.

4. Schor admittedly made false allegations that Stotler refused to accept orders placed by him on October 9, both in a letter to Stotler and in resisting a claim for payment of deficits by Stotler.

On the basis of all the evidence, it appears that Schor telephoned Conti on October 8, hoping to discuss his account with Richard Sandor, and, when Sandor was not present, Schor became upset and impatient and ultimately declined to place any market orders until after the close of trading on October 9, in the hope of a market rebound. In this process, Schor acted voluntarily and respondents violated no provisions of the Commodity Exchange Act or the Commission's regulations.

The second group of allegations made by complainants concerns the handling of their accounts prior to October 8, 1979. Complainants assert that they were unsuitable for holding long GNMA futures contracts, that they were not given adequate risk disclosure by respondents, and that they were misled by assurances from Richard Sandor that the market prices for GNMA futures would not drop below a certain level.

Respondents have cited *Jensen* v. *Shearson Hayden Stone, Inc.*, 2 Comm. Fut. L. Rep. (CCH ¶21,062 (1980)) for the proposition that complainants were eminently suited to trade futures contracts. Complainant Schor was a well-educated, experienced trader in financial futures at the time he opened his account with Conti. His business (mortgage banking) was closely related to the commodity (GNMAs) he traded at Conti, and he and MSA had substantial assets and income. In deciding *Jensen*, Judge Shipe noted as follows:

> In September 1977, the Commission published a proposed suitability rule. 42 C.F.R. 44750. However, this rule was not adopted because of the recognition that suitability was implicit in the existing anti-fraud rules

and efforts to further codify the concept would risk narrowing its scope. 43 F.R. 31889.

On October 9, 1981, the Commission denied Jensen's application for review, and made the following observation in a footnote:

> In particular, the Commission wishes to disavow the judge's reference to, and discussion of, suitability at pp. 16-19 of the initial decision.

Jensen, therefore, may not be cited as authority on the issue of suitability. Nevertheless, I agree with respondents that complainants were eminently suited to trade the futures contracts involved in this proceeding, and that complainants meet any explicit or implicit suitability standard that may exist.

Being experienced in trading financial futures, complainants needed no particular statement of the risks involved in such trading, and did not claim at the hearing that they were ignorant of any particular risks that should have been disclosed. Moreover, complainants did receive a letter from Conti, at the time they opened their accounts, outlining in general the risks of commodity trading. It appears that complainants' only argument as to risk disclosure is that they should have been provided with the disclosure form required by Section 1.55 of the Commission's Rules and Regulations, 17 C.F.R. § 1.55. This regulation, however, applies only to accounts opened after October 1, 1978, more than two years after the opening of complainants' accounts, and so has no application here.

As to Richard Sandor's alleged statements regarding the lowest price the market would reach, I found complainant Schor's testimony vague and uncertain, indicating that at most he had been given a best guess prognosis. This conclusion is buttressed by the fact that complainants continued to hold their long positions for over a month after the market went below the level allegedly declared to be the bottom. In the general handling of complainants' accounts, there has

again been shown no violation of the Commodity Exchange Act or the Commission's regulations.

Thus, respondents are entitled to recover the deficit balances in complainants' accounts, as provided by their customer agreements and Commission regulation 12.23(b)(2). The amount of these deficits is not disputed. Respondents, in addition, seek pre-judgment interest and reasonable attorneys' fees incurred in collecting the deficits, as is also provided by the customer agreements. Pursuant to *Sherwood* v. *Madda Trading Co.*, [1977-80 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,728 (1979), attorneys' fees may not be awarded in a reparations proceeding in the absence of bad faith or vexatious conduct during the course of a proceeding. Under ordinary circumstances, interest on awards is set at 12 percent per annum. Respondents seek only 5 percent per annum, and I see no reason to disturb any understanding that may exist between the parties as to this issue.

Complainants contend in their objections filed October 16, 1981, that the Commodity Exchange Act, as amended, does not empower this Commission to make an award for anything other than damages resulting for a violation of the Act, and that Commission regulation 12.23 is without statutory authority. This may be a neat legal point. However, an administrative law judge is bound by agency regulations and published agency policies. The rules provide for counterclaims. I have determined that a valid debit balance exists on the complainants' accounts, and have awarded judgment for the debit balances to respondents.

Conclusions of Law:

1. Complainants have failed to establish that respondents committed any violation of the Commodity Exchange Act, as amended, or of the regulations enacted thereunder, in the handling of complainants' accounts.

2. Complainants are liable to pay to respondent Conti the amount of the deficits in their accounts, *i.e.*, $55,955.60 from complainant MSA and $36,393.77 from complainant Schor,

together with pre-judgment interest at the rate of 5 percent per annum.

ORDER

Complainant MSA is ordered to pay $55,955.60 and complainant Schor is ordered to pay $36,393.77, together with 5 percent interest on these sums from November 1, 1979, and $25.00 each to cover the filing fee, to respondent Conti within 30 days of the date of this decision. The complaints of Schor and MSA are dismissed.

Dated this 19th day of
October 1981

George H. Painter
Administrative Law Judge

APPENDIX H

(Order of the Commission Denying Review; Unofficially Reported At CCH Comm. Fut. L. Rep. ¶ 21,823 (1982-1984 Trans. Binder))

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

MORTGAGE SERVICES OF AMERICA and WILLIAM T. SCHOR, Complainants v. **CONTICOMMODITY SERVICES, INC. and RICHARD L. SANDOR,** Respondents	CFTC Docket No. R 80-566-80-723

ORDER DENYING REVIEW

Upon consideration of the application for review and the record as a whole, the Commission has discerned no question of law or public policy to warrant Commission consideration of the merits of the initial decision filed by the Presiding Officer. Accordingly, the Commission has determined that the application for review should be denied. In making this determination, the Commission has neither adopted the Presiding Officer's order as its own nor affirmatively passed upon any of the issues decided therein.[1] Thus, although the Commission has determined to permit the initial decision to become final as to the parties, the order shall not be binding as a Commission decision in other cases.

Accordingly, IT IS ORDERED that the initial decision of the Presiding Officer shall become final with respect to the

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[1]The complainants have objected to the fact that the Presiding Officer directed the respondents to prepare a draft of his initial decision. The Presiding Officer adopted verbatim the 24 findings of fact submitted by respondents and made only a few minor modifications to the other parts of respondents' proposed decision. While we do not believe that the Presiding Officer abused his discretion in this regard, we suggest that, in the future, this procedure be used, if at all, only in exceptional cases. *Cf. Hayes* v. *Thompson*, 637 F.2d 483, 490 (7th Cir. 1980) ("Although we are to be more critical in our review when a District Court, as here, essentially adopts the findings prepared by the prevailing party, such findings are nonetheless to be measured by the 'clearly erroneous' standard.")

parties upon service of this Order on the parties by the Hearing Clerk.[2]

By the Commission (Acting Chairman PHILLIPS and Commissioners HINEMAN and WEST).

Jane K. Stuckey
Secretary of the Commission
Commodity Futures Trading
Commission

Dated: June 15, 1983

[2] Any appeal from a Commission order must be taken within fifteen days of service of this order pursuant to Section 14(e) of the Act, 7 U.S.C.A. § 18(c) (Supp. 1983), as it incorporates by reference Section 6(b) of the Act, 7 U.S.C. § 9.

Pursuant to Section 14(d) of the Act, 7 U.S.C.A. § 18(d) (Supp. 1983), a party against whom a reparation award has been made may be sued in United States district court to enforce the award if such party does not make payment within the period specified in the order making the award, or within 15 days of service of this order by the Hearing Clerk if no period is specified.

Pursuant to Section 14(f) of the Act, 7 U.S.C.A § 18(f) (Supp. 1983), unless the party against whom a reparation order has been made provides to the Commission, within 15 days from the expiration of the period specified in the order for compliance, or within 30 days of service of this order by the Hearing Clerk if no period is specified, satisfactory evidence that either (1) an appeal has been taken pursuant to Section 14(e), or (2) payment of the full amount of the award (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all contract markets and, if the party is registered with the Commission, such registration shall be suspended automatically. Such a prohibition and suspension shall remain in effect until such party provides to the Commission satisfactory evidence that payment of the full amount of the award with interest thereon to the date of payment has been made.

APPENDIX I

(Constitutional Provisions, Statutes and Regulations Involved)

U.S. CONSTITUTION, ARTICLE III, §1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

7 U.S.C. § 18 (1976)

§ 18. Complaints against registered persons

(a) ***Petition***

Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person registered under section 6d, 6e, 6j or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

(b) ***Investigation and hearing***

If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: Provided, That in complaints wherein the amount claimed as damages does not exceed the sum of $2,500, a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

(c) ***Determination***

After opportunity for hearing on complaints where the damages claimed exceed the sum of $2,500 has been provided or waived and on complaints where damages claimed do not exceed the sum of $2,500 not requiring hearing as provided herein, the Commission shall determine whether or not the

respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

(d) ***Bond requirement when complainant is nonresident; waiver***

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: Provided That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(e) ***Reparations***

If after a hearing on a complaint made by any person under paragraph (a) of this section, or without hearing as provided in paragraphs (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the

person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

(f) ***Enforcement of reparation award***

If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the District Court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under paragraph (g) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(g) ***Review***

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective

unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(h) ***Penalty***

Unless the registrant against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order, he shall be prohibited from trading on all contract markets and his registration shall be suspended automatically at the expiration of such fifteen-day period until he shows to the satisfaction of the Commission that he has paid the amount therein specified with interest thereon to date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(i) *Effective date*

The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen month period.

7 U.S.C. § 18 (1982)

§ 18. Complaints against registered persons

(a) *Petition for actual damages*

Any person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation.

(b) *Rules and regulations; control over right of appeal*

The Commission may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section. Notwithstanding any other provision of law, such rules, regulations, and orders may prescribe, or otherwise condition, without limitation, the form, filing, and service of pleadings or orders, the nature and scope of discovery, counterclaims, motion practice (including the grounds for dismissal of any claim or counterclaim), hearings (including the waiver thereof, which may relate to the amount in controversy), rights of appeal, if any, and all other matters governing proceedings before the Commission under this section.

(c) *Bond requirement when complainant is nonresident; waiver*

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: Provided, That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a

country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(d) *Enforcement of reparation award*

If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under subsection (e) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(e) *Review*

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least

equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(f) *Automatic bar from trading and suspension for noncompliance; effect of appeal*

Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all contract markets and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(g) *Effective date*

The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen month period.

17 C.F.R. § 12.23(b)(2)(1983)

§ 12.23 RESPONSE TO COMPLAINT

. . .

(b) . . .

(2) *Counterclaims.* An answer may set forth as a counterclaim facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under § 12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

17 C.F.R. § 12.19(1984)

§ 12.19 COUNTERCLAIM

A registrant may, at the time of filing an answer to a complaint, set forth as a counterclaim: (a) Facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under § 12.13 of these rules; or (b) any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

APPENDIX J
(Excerpts From Record)

[Excerpt From "Defendants' Memorandum in Support of Motion to Dismiss or Stay Pending Administration Action" Filed By Schor in Case No. 80 C 1089 in the United States District Court for the Northern District of Illinois, Contained at Pages 887-888 of the Appendix in the Proceedings Below]

III. PRIOR PENDING ACTION

On February 21, 1980, pursuant to 7 U.S.C.A. § 18, the defendants herein filed Complaints against plaintiff, Conti-Commodity, before the Reparations Unit of the Commodity Futures Trading Commission (C.F.T.C.). Such Reparations Complaints alleged that ContiCommodity failed to diligently execute orders of the defendants, effected transactions in defendants' commodity accounts without specific authorization of the defendants, failed to disclose the risks which the defendants were undertaking in such trading, committed fraud per se against the defendants during the course of such trading, failed to diligently supervise the defendants' accounts, failed to provide proper guidance in such trading for defendants and conducted unauthorized trades in defendants' accounts all to the damage of defendants herein. Each and every allegation of defendants' reparation complaints arises from the same transactions which are the subject matter of the present action. Pursuant to Commodity Exchange Act Regulation § 12.23(b)(2), ContiCommodity may set forth a counterclaim to the reparations complaints for any claim which "... arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." If this action is permitted to continue, defendants will be required by Rule 13(a) of the Federal Rules of Civil Procedure to file a compulsory counterclaim setting forth all of the claims they have already filed before the C.F.T.C. Therefore, plaintiff's action in this forum is totally duplicative of the reparations proceedings which are already pending.

(3) (2)

Nos. 85-621 and 85-642

In The
Supreme Court of the United States
October Term, 1985

CONTICOMMODITY SERVICES, INC.
and
COMMODITY FUTURES TRADING COMMISSION,
Petitioners,

v.

WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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November 18, 1985

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals was correct in construing § 14 of the Commodity Exchange Act, as it was worded prior to the amendments of 1983, as not conferring upon the Commodity Futures Trading Commission jurisdiction to award money damages on a counterclaim based entirely on a state common law cause of action, where such a construction avoids a Constitutional question under Article III.

STATEMENT UNDER RULE 28.1

Respondent, Mortgage Services of America, a New Jersey Corporation, is a wholly-owned subsidiary of The Howard Savings Bank, a New Jersey Stock Savings Bank Corporation. Affiliates of Mortgage Services of America are the other wholly-owned subsidiaries of The Howard Savings Bank which are: The Howard Federal Savings F.A., HOWCO Investment Group, The Howard Relocation Group, The Howard Insurance Group and HOWCO Residential Development, Inc.

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ADDITIONAL RELEVANT AUTHORITY

The decision of the court of appeals agrees exactly with the original CFTC construction of the Commodity Exchange Act Reparations provisions regarding counterclaims. The Commission's originally proposed rules limited counterclaims (like claims) to those predicated on violations of the Commodity Exchange Act, as did the decision of the court below. The CFTC Commentary on those proposed rules stated:

> But there appears to be a substantial question whether the Commission has been authorized by § 14(a) to permit any "reparation award" to be based upon matters other than alleged violations by a registrant, and whether jurisdiction has been granted, under that section or otherwise, to enter any money-damage award on any other basis. 40 Fed. Reg. 55,666, 55,667 (1975).

In reaction to futures industry objections the Commission's final rules expanded the scope of the counterclaim provision of Reparation Rule 12.23(b) (2) to include those based on state law. 41 FED. REG. 3,993, 3,995 (1976).

It should be noted that the "substantial question" concerning jurisdiction over counterclaims related solely to the language of the Commodity Exchange Act and not to any conflict with Article III of the Constitution.

———o———

COUNTERSTATEMENT OF THE CASE

This case was previously before this Court on identical Petitions for Certiorari by the same Petitioners (Nos. 84-1500 and 84-1519 both of October Term, 1984). On July

2, 1985 this Court granted the Petitions for Certiorari, vacated the judgment below, and remanded the case to the United States Court of Appeals, District of Columbia Circuit, for further consideration in light of *Thomas, Administrator, EPA v. Union Carbide Agricultural Products Co.*, 473 U.S. —, 105 S.Ct. 3325 (1985).

The Court of Appeals, on August 13, 1985, found the *Thomas* case involved no question of statutory construction, and arose exclusively within the confines of federal law. Accordingly, it was "unable to find in that case [*Thomas*] reasoning that would lead us to a different result in *Schor*." *Schor v. Commodity Futures Trading Commission*, 770 F.2d 211 (D.C. Cir. 1985).

The Court of Appeals then reinstated its previous judgment which invalidated a CFTC regulation (17 C.F.R. § 12.23(b)(2) (1983), now codified at § 12.19) permitting counterclaims based on state common law causes of action in CFTC reparations proceedings. In reparations proceedings initial claims must be based on violations of the Commodity Exchange Act ("the Act"). 7 U.S.C. § 18. The court below found the Act, as worded prior to the 1983 amendments, did not authorize the CFTC to entertain state law counterclaims.

One of the reasons advanced by the Court in holding that the Act did not authorize such counterclaims was that the Act should not be construed so as to raise a Constitutional issue if such a construction can be avoided. It then found that the Act and its legislative history supported a construction excluding non-Act counterclaims.

The Court of Appeals, on its own motion, raised the issue of whether CFTC adjudication of common law counterclaims also violated Article III of the United States Constitution. It concluded that it was not necessary to reach that Constitutional question because the Commodity Exchange Act did not indicate a Congressional intent to confer jurisdiction over common law counterclaims upon the CFTC. It based that decision on the following points:

1. The Commodity Exchange Act can be fairly construed so as to be free of even arguable Article III Constitutional objections.

2. While the Act and its legislative history mention counterclaims (without expressly authorizing them), nowhere is there mention of state law or even non-Act counterclaims.

3. The Act and its legislative history do not demonstrate a Congressional intention regarding CFTC jurisdiction over common law counterclaims and none should be read into the Act.

4. The Act can be read to authorize only those counterclaims based upon violations of the Act to which there are no Constitutional objections.

5. The deference to the statutory construction by an agency of a law it administers does not apply where the agency's construction has been inconsistent and where the question is one of jurisdiction and legislative delegation of power with which courts customarily deal.

6. Amendments to the Act and their legislative history subsequent to this case and Congressional silence on this issue do not ratify the present Conti and CFTC interpretations, particularly

where there is no explicit statement in any of those materials that the CFTC was expected to exercise jurisdiction specifically over state common law counterclaims.

7. Congress has never before authorized any administrative agency to decide common law counterclaims and, without a clear expression of an intent to confer such unprecedented power, it should not be inferred.

8. Neither Congress nor the CFTC considered the Article III Constitutional questions raised by CFTC adjudication of state law counterclaims and, therefore, a Congressional intent to provoke those questions should not be inferred.

The Court of Appeals denied suggestions for rehearing and rehearing en banc by a vote of nine to two. The dissent from the denial of a rehearing stated that the court "should squarely face the issue of whether such a statutorily crafted scheme is unconstitutional". Conti Appendix, C-3; CFTC Appendix, 72a.

Respondents in this Court, William T. Schor (Schor) and Mortgage Services of America (MSA), filed reparations claims against ContiCommodity Services, Inc. (Conti), a Petitioner here, and Richard Sandor. These claims were filed with the Commodity Futures Trading Commission (CFTC), the other Petitioner here. Pursuant to § 14 of the Commodity Exchange Act, 7 U.S.C. § 18, the CFTC established a reparations procedure under which any person injured by a violation of the Act or CFTC regulations thereunder may petition the CFTC for an

order directing payment of reparations by the violator to that injured person.

Conti's response to the Schor and MSA reparations claims included counterclaims against each asserting they were liable to Conti under state common law principles for deficits in their futures trading accounts with Conti.

After an evidentiary hearing before a CFTC Administrative Law Judge and briefing by both sides, the ALJ directed Conti's counsel to prepare a Proposed Initial Decision dismissing the claims of MSA and Schor and granting the Counterclaims of Conti against them. MSA and Schor objected to the Proposed Initial Decision arguing, inter alia, that the CFTC was not authorized by Congress to adjudicate counterclaims not based on violations of the Act and that the ALJ had refused to consider common law claims of Schor and MSA based on the same transactions even as defenses to Conti's common law counterclaims.

The Proposed Initial Decision prepared by Conti's counsel was adopted, essentially verbatim, by the ALJ. With regard to the objection to the awards on the counterclaims the ALJ did add:

> This may be a neat legal point. However, an administrative law judge is bound by agency regulations and published agency policies. The rules provide for counterclaims". Conti Supplemental Appendix, G-9: CFTC Appendix, 62a-63a.

Application for review of the Initial Decision by Schor and MSA was denied by the Commission and they appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to § 14(g) of the Commodity Exchange Act. 7 U.S.C. (& Supp. V. 1981) § 18(g).

In this Court Conti and the CFTC have filed separate petitions for certiorari, both restricted to the issue of whether the CFTC is authorized to hear state law counterclaims. Respondents have cross-petitioned only on whether the CFTC can hear customers' state law defenses and counterclaims to brokers' counterclaims.

REASONS FOR DENYING CERTIORARI

I. Thomas, Administrator, EPA v. Union Carbide Agricultural Products Co., 473 U.S. —, 105 S. Ct. 3325 (1985), Supports A Denial Of Certiorari Here.

Petitioners both vehemently attack the conclusion of the Court below that *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. —, 105 S. Ct. 3325 (1985), has no bearing on this case. However, the rationale of the Court below is unassailable.

First of all, in *Thomas* there was no question that Congress intended the arbitrators to decide the valuation question. Here, the Commodity Exchange Act said nothing about entertaining counterclaims grounded in state common law and the CFTC itself had originally doubted its power to adjudicate such counterclaims. 40 Fed. Reg. 55,666, 55,667 (1975). Indeed, the language of Section 14 of the Commodity Exchange Act limits awards to those based on violations of that Act. Therefore, a real issue of statutory construction existed here and no such issue existed in *Thomas*.

Secondly, this was a case involving adjudication by a non-Article III tribunal of a state common law contract claim. *Thomas* involved only federally created rights and so held:

> "Any right to compensation from follow-on registrants under § 3(c)(1)(D)(ii) for EPA's use of data results from FIFRA and does not depend on or replace a right to such compensation under state law." 473 U.S. at —, 105 S. Ct. at 3335.

Crowell v. Benson, 285 U.S. 22 (1932), (reavily relied on by the CFTC as revitalized by *Thomas* but ignored by Conti) fully supports the statutory construction decision by the Court of Appeals in this case. In *Crowell* this Court held:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case." 285 U.S. at 62.

In *Crowell* there was no express provision in the federal statute involved there that determination by the deputy commissioner of the fundamental facts of place of injury and employment relationship be final. Accordingly, to avoid the Article III issue raised if such determinations were final, the Court concluded they were not final. It went on to uphold the procedure in the lower court which had required a trial de novo in the District Court. It also affirmed the decision of the Federal District Court which had overruled the finding of fact by the deputy commissioner that the injured party was employed by Benson.

If as the CFTC urges *Crowell* governs this case, then the Commodity Exchange Act should be construed so as to avoid the Article III question. If the Act here cannot be so construed, then, under *Crowell,* the Act is clearly unconstitutional since as to the fundamental facts of the state law counterclaim here, there is no opportunity for a trial de novo in an Article III Court.

II. Granting Certiorari Will Only Confuse, Not Clarify, The Law Under Article III Of The Constitution.

Petitioners would have this Court go out of its way to reopen a Constitutional Pandora's box. This the Court of Appeals declined to do.

Obviously, if this Court were to decide that Congress had intended the CFTC to have jurisdiction over common law counterclaims it would then have to decide whether this violates Article III of the Constitution since no CFTC official has the tenure and salary protections provided by Article III.

On the other hand, by construing the Commodity Exchange Act, as worded prior to 1983, as not expressing a Congressional intent to authorize the CFTC to adjudicate common law counterclaims, the Court of Appeals avoided a constitutional confrontation with Congress and the confusion it would generate on the very sound basis that there was no indication that Congress intended such a confrontation. If Congress decides now that it wishes the CFTC to have such authority it can amend the Commodity Exchange Act to so provide.

Clearly, the Court below was correct in avoiding this issue. And the granting of certiorari here would confront

the Court with a case where any decision would only confuse, not clarify, the law under Article III.

If this Court were to reach the Article III constitutional issue concerning counterclaims and decide it either way it would seem to be approving the express Congressional grant of jurisdiction to the CFTC to adjudicate private disputes between individuals based on violations of the Commodity Exchange Act. This is an issue that should be addressed directly but it is not presented by either these Petitions, or by Respondents' Cross-Petition. Such an appearance of Constitutional approval would encourage Congressional creation of non-Article III forums to decide private disputes, even if the Court held that state law counterclaims cannot be tried by non-Article III forums.

This case also illustrates how expansive jurisdiction must be made once state law counterclaims are included. Here the claimants also asserted state law claims both as claims and defenses to the state law counterclaims of Conti. The ALJ rejected that position but as the Court of Appeals noted, the CFTC in that Court was expressly noncommittal on whether a claimant may introduce state law claims and defenses against state law counterclaims. 740 F.2d at 1279, fn. 29. See Respondents' Cross-Petition in this case raising that issue.

In summary, the case does not present this Court with an opportunity to clarify the law under Article III.

III. The Decision Below Does Not Conflict With Those Of This Or Any Other Court.

Neither Petitioner contends the decision creates a conflict among the circuits. Conti alone argues that this

case conflicts in principle with a later Tenth Circuit case. *United States v. Dobey,* 751 F.2d 1140 (10th Cir. 1985). No such conflict exists. The only similarity between the cases is that both mention Article III. *Dobey* found the Magistrates' Act Constitutional. This case did not reach the Article III question under the Commodity Exchange Act. In construing § 14 of the Act as worded prior to the 1983 amendments it found Congress did not intend that the CFTC adjudicate state law counterclaims. It found that conclusion fortified by the Article III constitutional questions the opposite construction would raise.

Even if this case had invalidated the CFTC counterclaim regulation on an Article III theory, it would not conflict with any Article III case.

Dobey and all the other Magistrates Act cases, necessarily involved express, uncoerced consent to trial by an official designated and supervised by an Article III court. Those cases were also each subject to removal of the case by such a court. Certainly no such consent is involved here. The CFTC is not appointed or supervised by any Article III court. Reparations proceedings are not removable to an Article III court. And, finally, no Article III question was decided here.

Thus, the case conflicts with none of the Circuit decisions cited by Petitioners.

In fact, even if it was based on an Article III rationale, it would be in perfect harmony with those cases and with the only case which expressly dealt with a counterclaim under Article III. That case is *1616 Reminc Limited Partnership v. Atchison & Keller,* 704 F.2d 1313 (4th Circuit 1983). There a bankrupt filed a state law counter-

claim to a proof of claim and both the claim and counterclaim were tried before a referee in bankruptcy under the Bankruptcy Act of 1898, as amended, and both were dismissed by the referee. The counterclaiming bankrupt contested, under Article III, the validity of the referee's decision against its own counterclaim. The Fourth Circuit held the trial of the state law counterclaim by the referee was invalid under Article III. It specifically found that seeking protection of the bankruptcy act did not imply consent to trial by an otherwise unconstitutional tribunal. 704 F.2d at 1318, fn. 14. Likewise here, the court of appeals would not imply consent from the filing of the CFTC reparations proceeding.

The assertions by Petitioners that the case conflicts with decisions of this Court are also wrong. This Court has never construed § 14 of the Commodity Exchange Act regarding any issue concerning either Article III or state law counterclaims.

Of course, *McElrath v. United States,* 102 U.S. 426 (1880), cited only by the CFTC, addressed no Article III question. It merely illustrated that a waiver of sovereign immunity could be made subject to any conditions imposed by the sovereign. *McElrath* does not support Congressional creation of non-Article III tribunals authorized to decide private counterclaims under state law.

Crowell v. Benson, 285 U.S. 22 (1932), also mentioned only by the CFTC, involved adjudication only of rights. created by Congress, not state common law rights.

Of the other Supreme Court cases cited by Petitioners, all but two involved adjudication by officials appointed and supervised by an Article III court, and involved cases

subject to the jurisdiction of and to removal to an Article III court. *Kimberly v. Arms,* 129 U.S. 512 (1889); *Heckers v. Fowler,* 69 U.S. (2 Wall.) 123 (1865); *Katchen v. Landy,* 382 U.S. 323 (1966); *Cline v. Kaplan,* 323 U.S. 97 (1944); and *McDonald v. Plymouth County Trust Co.,* 286 U.S. 263 (1932).

One of the remaining cases cited, *Scherk v. Albert Culver Co.,* 417 U.S. 506 (1974), an arbitration case, did not involve a forum created or appointed by either Congress or the Executive Branch.

The other case, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,* 458 U.S. 50 (1982), held that the Bankruptcy Act of 1978 violated Article III to the extent that it conferred jurisdiction on Bankruptcy judges to hear state law claims over the objection of one of the parties. Of course, there was no issue of consent in that case. In this case, the Article III question was not reached and the lower court indicated it could not imply consent on the record here since Schor and MSA "forcefully argued, both before and after the ALJ's *Initial Decision,* that the Commission lacks statutory authority to award Conti breach of contract damages." 740 F.2d at 1276. Additionally the court here, as did the Fourth Circuit in *Reminc,* supra, indicated that acquiescence to non-Article III adjudication of state law claims should not be a price paid by operation of law for access to a federal benefit.

Of course, the court below expressly noted it was not deciding the issue of whether consent overcomes Article III objections. 740 F.2d at 1276.

Thus, even if the court of appeals had decided that CFTC adjudication of state law counterclaims violates

Article III, there would have been no conflict with any decision of this Court or any other court of appeals. Of course, there was no Article III decision made here.

IV. The Decision Resolves No Important Question Of Federal Law.

Petitioners also contend that the case involves an important issue of Federal law because of its impact on the CFTC reparations procedure. Actually, the case involves a narrow statutory construction and procedural issue affecting the scope of counterclaims in a unique procedure involving a relatively small category of cases.

Both petitioners have attempted to magnify the significance of the decision by claiming that unless the CFTC has jurisdiction over common law counterclaims no one will use the CFTC reparations procedure.

The CFTC has volunteered no statistics on the numbers of cases that involve counterclaims. However, the order it entered decreeing that it will continue to process counterclaims despite this case specified only sixty cases involving counterclaims docketed from 1980 through the date of the order, September 10, 1984. See *In the Matter of Various Reparations Proceedings in Which Counterclaims have Been or in the Future are Filed,* 2 Comm. Fut. L. Rep. (CCH) ¶ 22,352. While the CFTC has furnished statistics that 8000 reparations claims have been filed since 1976, or approximately 1000 per year, it has not indicated what percentage of the cases involved counterclaims. But since there are only sixty counterclaim cases presently pending, apparently filed over a period of at least four years, that would seem to indicate that

counterclaim cases represent something less than two percent of the cases filed.

Moreover, the withdrawal of counterclaim jurisdiction does not really change the situation confronting customers trying to decide whether to proceed in reparations, court or arbitration. See 17 CFR § 180.1 et seq. Even before this decision, brokers could and did file their state law claims in court instead of counterclaiming. In fact, that happened in this case.

Of course, the CFTC can itself obviate any difficulty its lack of jurisdiction over state law counterclaims allegedly presents. By exercising its authority to regulate registrants under the Act it can direct them not to pursue court proceedings for a deficit balance to judgment until pending reparations proceedings are concluded. It can also direct registrants to give credit for any reparations awarded against them.

Whether or not the CFTC takes this sensible step for the benefit of customers it is supposed to protect, customers will file there regardless of where their brokers file against them. That is exactly what Schor and MSA did here.

Thus, the impact of this decision does not reach much beyond the parties to the case. And if Congress believes the decision significantly diminishes the efficacy of the reparations program, it can legislatively rectify the situation by, among other options, expressly authorizing state law counterclaims. Then, if there is an Article III constitutional issue raised, it would be ripe for decision.

V. The Decision Correctly Construes An Act Of Congress And Resolves No Article III Constitutional Question.

While the CFTC argues here that denial of jurisdiction over state common law counterclaims against customers will deter customers from using the CFTC as a reparations forum, this somewhat strained argument was not a reason given by the CFTC when it reversed its original position that only counterclaims based on act violations were authorized by the act. Instead, in promulgating the regulation authorizing such counterclaims, it relied on numerous comments that the proposed regulation was "unfair, prejudicial to respondents", who are, of course, always brokers.

However, a reading of the Commodity Exchange Act and its legislative history reveals total and almost studious avoidance by the legislature of language referring to state law counterclaims, common law counterclaims, and counterclaims not based on violations of the Act. From this it is more than reasonable to infer that Congress believed such jurisdiction would be Constitutionally suspect and intended to avoid the issue. Under these circumstances this Court should do likewise. This is especially so when the CFTC itself expressly doubted its authority to provide for counterclaims not based upon violations of the Act in its proposed reparations and its commentary thereon. 40 Fed. Reg. 55,666, 55,667 (1975). As pointed out above (see supra, page 1), based on industry comments, the final regulations implementing the reparations procedure provided for counterclaims such as those invalidated here. 41 Fed. Reg. 3994, 4002 (1976); 17 C.F.R. § 12.23(b)(2) (1983) now codified at 17 C.F.R. § 12.19.

Even in *Friedman v. Dean Witter and Company, Inc.* [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 (CFTC 1981), where the CFTC ruled that its current counterclaim regulation was valid, it stated:

> "Clearly, reparations was designed primarily as a forum in which customers might vindicate grievances against commodity professionals where violations of the Act and regulations are involved, *and not for debit balance collection at the behest of commodity professionals.*" [1981-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 at p. 25,538. (Emphasis supplied).

Applying the standards used by this Court in determining Congressional intent when the law is itself silent (which is not the case here), the conclusion is inescapable that Congress did not intend the CFTC to entertain non-Act counterclaims. For example, in the area of determining whether Congress intended a private right of action to exist for violation of a federal regulatory scheme each test points toward a denial of CFTC authority to entertain non-Act counterclaims.

One test, whether the claimant is part of the class for whose especial benefit the statute was enacted, when applied to these counterclaims demonstrates that authority to make non-Act counterclaim awards cannot be inferred since the reparations procedure was not intended for their benefit. See *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33 (1916). As the CFTC itself recognized in *Friedman,* supra, Congress never intended to benefit the class whose depradations it sought to deter.

Another indication of Congressional intent used by this Court in the private right of action area is whether

it is consistent with the underlying purposes of the legislative scheme to imply a remedy for the claimant. E.g. *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453 (1974) and *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975).

The purpose of CFTC reparations is to afford a remedy for customers against registrants, not vice-versa.

Since *Cort v. Ash,* 422 U.S. 66 (1975) the Court has emphasized determination of actual Congressional intent over the *Rigsby* implied intent approach. Neither the statute itself nor its legislative history indicates any intent to permit non-Act counterclaims in CFTC reparations proceedings. In fact all indications are to the contrary, as the CFTC found in its original proposed reparations regulations.

Of course, before resort may be made to legislative history or court created indicators of legislative intent, the statute itself must be found to be ambiguous. Section 14 of the Act limited reparations awards, at the time this claim arose and today, to violations of the Act, not once but three times. In Section 14(a) it limits applications to the CFTC for reparations to those "complaining of any violations of any provision the Act or any rule, regulation or order thereunder by any person who is registered or required to be registered under [the Act]." 7 U.S.C. § 18.

In Section 14(c) of the Act as worded at the time this claim arose it required the Commission to "determine whether or not the respondent has violated any provision of this Act or any rule, regulation or order thereunder."

Finally Section 14(e) (as it existed when this claim arose and at the time of the hearing thereon) authorizes the Commission to "determine the amount of damage, if any to which such person is entitled as a result of such violation" if "the Commission determines that the respondent has violated any provision of this Act, or any rule, regulation or order thereunder."

All parties concede that failure to pay a deficit balance in a trading account is not a violation of the Act. Therefore, in the absence of a finding of a violation of the Act the CFTC had no jurisdiction to make an award of any kind.

Finally, during the Congressional Hearings on the then proposed Commodity Futures Trading Commission Act of 1974, which created the CFTC reparations procedure, numerous witnesses, all representing registrant interests—none representing customers, testified that the statute should "delineate the scope of permitted counterclaims" and "that counterclaims should be permitted." See Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 before the House Comm. on Agriculture, 93rd Cong., 2d Sess. 97, 169, 254 (1974). In spite of this apparently unanimous plea by the industry Congress decided in 1974 not to state in the Act or elsewhere that non-Act counterclaims were to be entertained by the CFTC. When Congress does not include a requested provision then the only possible conclusion is that Congress denied the request.

———o———

CONCLUSION

Certiorari should be denied because the petitions present no issue that will resolve any Constitutional question, any conflict among the circuits or any significant question of federal law. Moreover, the decision below is correct.

Respectfully submitted,

Leslie J. Carson, Jr.
1004 Robinson Building
42 South 15th Street
Philadelphia, PA 19102
(215) 568-1587

Attorney for All Respondents

Nos. 85-621 and 85-642

In the Supreme Court of the United States

OCTOBER TERM, 1985

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

CONTICOMMODITY SERVICES, INC., PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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ContiCommodity Services,
Inc.

PETITION FOR A WRIT OF CERTIORARI IN NO. 85-621 FILED OCTOBER 11, 1985

PETITION FOR A WRIT OF CERTIORARI IN NO. 85-642 FILED OCTOBER 16, 1985

CERTIORARI GRANTED DECEMBER 9, 1985

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TABLE OF CONTENTS*

* The opinions of the court of appeals are printed in the appendix of each petition for a writ of certiorari and have not been reproduced.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1703
WILLIAM T. SCHOR, PETITIONER
v.
COMMODITY FUTURES TRADING COMMISSION
AND
CONTICOMMODITY SERVICES, INC.
AND
RICHARD L. SANDOR, RESPONDENTS

No. 83-1704
MORTGAGE SERVICES OF AMERICA, PETITIONER
v.
COMMODITY FUTURES TRADING COMMISSION,
AND
CONTICOMMODITY SERVICES, INC.
AND
RICHARD L. SANDOR, RESPONDENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
(T)06-28-83	4-Petitioner's petition for review of an order of the CFTC (m-27)
(T)06-28-83	Certified copy of petition for review was mailed to CFTC
(J)07-07-83	4-Petitioner's emergency motion for relief from requirement of posting of bond or, in the alternative, for reduction of bond (m-7)
(J)07-07-83	4-Petitioner's memorandum of points and authorities in support of emergency motion (m-7)
(B)07-11-83	Clerk's order, sua sponte, that these cases (Nos. 83-1703 & 83-1704) are hereby consolidated

(J)07-11-83 4-Respondent's (Commodity Futures Trading Commission) response in opposition to petitioners' emergency motion for relief from requirement of posting bond or, in the alternative, for reduction of bond (m-11)

(J)07-11-83 4-Respondent's (Conticommodity Services, Inc.) response in opposition to petitioners motion for relief with respect to bond (m-11)

(C)07-12-83 Per Curiam order granting in part and denying in part petitoner's emergency motion for relief from requirement of posting bond or, in the alternative, for reduction of bond. Petitioner has challenged the applicability and constitutionality of the statutory double bond requirement. See 7 USC § 18(e). We recognize the significance of these issues, see Saharoff v. Stone, 638 F.2d 90 (9th Cir. 1980), and which [*sic*] to preserve the questions for full consideration on the merits. Accordingly, in view of respondent Conticommodity Services, Inc.'s representation that less than a double bond will adequately protect its interests, we grant petitioner's motion in part and set the bond at $145,000 pending consideration of and any further action in this case by the merits panel. This order leaves it open to that panel to accord full consideration to all parties' arguments concerning the bond requirement, including its applicability in this case, its constitutionality, and the amount at which the bond should or must be set. Petitioner shall submit a

bond in the amount of $145,000 within the statutory time period as a prerequisite to maintaining this appeal. All other requested relief is denied: Wald, Mikva (who did not participate) and Ginsburg, CJs

(C)07-14-83 4-Letter dated 7/13/83 from counsel for petitioner enclosing bond in amount of $145,000 and requesting that the Clerk deposit this bond

(C)07-14-83 Certified check #1783 dated 7/13/83 from counsel for petitioner—sent to Clerk 10:15 am 7/14/83 by Manager of Public Office (check is in amount of $145,000)

(W)07-14-83 Escrow account opened 7-14-83

(B)08-08-83 CERTIFIED INDEX TO RECORD (n-4) (Vols. I, II & III)

(V)08-23-83 Clerk's order that a briefing schedule is set as follows: Petitioner's brief and appendix—09/19/83; Respondents' brief—10/19/83; Petitioner's reply brief, if any—11/02/83. These cases 83-1703 and 83-1704 shall be included in the pool of cases for the January 1984 calendar—see order 9-16-83

(J)09-09-83 4-Petitioner's motion to extend time to file brief and appendix to 10-19-83 (m-9)

(V)09-16-83 Clerk's order that petitioners' motion for enlargement of time within which to file briefs and appendix is partially granted and the briefing schedule filed herein 08/23/83 is revised as follows: Petitioners' briefs and appendix—10/07/83; Respondents' brief—11/07/83; Petitioners' reply briefs—11/21/83. No further enlargement of time for filing petitioners' briefs will be granted by the

	Clerk. The selection of these cases 83-1703 and 83-1704 for oral argument must be delayed. The Clerk shall now include these cases in the pool of cases for the February-March 1984 calendar
(J)10-07-83	15-Petitioner's brief (m-7)
(J)10-07-83	7-Petitioner's appendix (Vols. I & II) (m-7)
(J)10-07-83	4-Petitioner's exhibits (Vols. I & II) (m-7)
(J)10-28-83	4-Respondent's (Commodity Futures Trading Commission) motion to extend time to file brief to 11-23-83 (m-28)
(V)11-08-83	Clerk's order that the motion to extend briefing time filed by respondent is granted and that the briefing schedule is revised as follows: Respondent's brief—11/23/83; Petitioner's reply brief—12/07/83. The Clerk shall retain the instant case in the pool of cases available for the Court's February 1984 calendar. No further extensions of time will be granted by the Clerk to any party herein
(J)11-07-83	15-Respondent's (Conticommodity Services, Inc.) brief (m-4)
(J)11-28-83	4-Respondent's (Commodity Futures Trading Commission) motion for leave to file motion to extend time to file brief (m-23)
(V)11-29-83	Clerk's order granting request for leave to file a motion for extension of time for filing brief
(V)11-29-83	4-Respondent's motion for extension of time to file brief until 11/25/83—per above order

(V)11-29-83	15-Respondent's (Commodity Futures Trading Commission) brief (m-25)
(J)12-07-83	15-Petitioner's reply brief (m-7)
(V)03-15-84	Clerk's order, sua sponte, that the following times are allotted for oral argument Petitioner—30 minutes; Respondents—30 minutes
(J)03-20-84	4-Letter from counsel for respondent (Commodity Futures Trading Commission) advising of additional authorities pursuant to FRAP 28(j) (m-19)
(V)03-23-84	Clerk's Notice that Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co., 102 S.Ct. 2858 (1982), held incompatible with article III bankruptcy court adjudication of state common law rights of action. The parties are instructed to address at the oral argument scheduled for March 26, 1984, the relevance of the Northern Pipeline decision to the Commission's authority to adjudicate counterclaims that are not based on violations of the Commodities Exchange Act or Commission regulations thereunder
(V)03-26-84	ARGUED before Ginsburg, CJ, SCJ MacKinnon and USDC Judge Barrington D. Parker. The Court granted all parties leave to submit supplemental briefs on the Northern Pipeline issue in 10 days
(B)04-05-84	15-Petitioner's supplemental brief (m-4)
(J)04-06-84	4-Respondent's (Conticommodity Service, Inc.) motion for leave to file supplement brief time having expired (p-6)

(J)04-06-84 4-Respondent's (Commodity Future[s] Trading Commission) motion for leave to file supplemental brief time having expired (m-6)

(V)05-07-84 Per curiam order that respondent's motion for permission to file supplemental brief instanter and of respondent's Conticommodity Services Inc. motion to file supplemental memorandum one day late are granted and the Clerk is directed to file the lodged supplemental brief and the lodged supplemental memorandum, and to enter same on the docket; Ginsburg, CJ, SCJ MacKinnon and USDC Judge Parker

(V)05-07-84 15-Respondent's (Commission) supplemental brief (m-6)

(V)05-07-84 15-Respondent's (Conticommodity Service) supplemental memorandum (p-4) (m-4)

(D)08-10-84 Opinion for the Court filed by Circuit Judge Ginsburg.

(D)08-10-84 Judgment by this Court that the order of the Commodity Futures Trading Commission under review herein is hereby affirmed in part, reversed in part, and these cases are remanded, all in accordance with the Opinion for the Court filed herein this date.

(D)08-10-84 Mandate order.

(J)09-24-84 15-Respondent's (ContiCommodity Services, Inc.) petition for rehearing and suggestion for rehearing en banc (m-21)

(J)09-24-84 15-Respondent's (Commodity Futures Trading Commission) petition for rehearing and suggestion for rehearing en banc (m-24)

(V)10-26-84 Per curiam order that the petitions for rehearing are denied; Ginsburg, CJ, SCJ MacKinnon and USDC Judge Parker

(V)10-26-84 Per curiam order, en banc, that the suggestions for rehearing en banc are denied; CJ Robinson, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, CJs (Circuit Judges Wald and Starr would grant the suggestions for rehearing en banc; (A statement of Circuit Judge Wald, concurred in by Circuit Judge Starr, is attached))

(J)10-31-84 4-Respondent's (Commodity Futures Trading Commission) motion to stay issuance of mandate (m-31)

(B)11-06-84 4-Petitioner's response in opposition to respondent's (Commodity Futures Trading Commission) motion to stay issuance of mandate (m-5)

(V)11-20-84 Per curiam order that the motion to stay issuance of mandate is granted and the Clerk is directed to withhold issuance of this Court's mandate through 12/03/84; Ginsburg, CJ, SCJ MacKinnon and USDC Judge Parker

(J)11-27-84 4-Respondent's (Commodity Futures Trading Commission) motion to stay issuance of mandate (m-27)

(J)12-05-84 4-Petitioner's response in opposition to respondent's (Commodity Futures Trading Commission) motion for stay issuance of mandate

(C)12-07-84 Per Curiam order that the Clerk is directed to withhold the issuance of this Court's mandate through Dec. 27, 1984; No fur-

ther stay for the purpose of preparing and filing a petition for certiorari shall be granted; Ginsburg, CJ; MacKinnon, SCJ and Parker, Dist. Judge, USDC for DC

(J)12-07-84 4-Respondent's (ContiCommodity Services, Inc.) response in support of motion to stay issuance of the mandate (m-7)

(J)12-26-84 4-Respondent's (ContiCommodity Services, Inc.) petition for maintenance of bond (m-21)

(J)12-28-84 4-Petitioner's response in opposition to respondent's petition for maintenance of bond (m-27)

(D)01-17-85 Mandate issued.

(J)01-16-85 Copy of letter dated 01-14-85 from Clerk, Supreme Court extending time to file petition for writ of certiorari to 03-25-85

(J)01-21-85 4-Petitioner's motion for refund of bond (m-30)

(J)03-29-85 Notice from Clerk, Supreme Court that petition for writ of certiorari was filed 03-25-85 in SC No. 84-1500

(T)04-04-85 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 84-1519 on March 25, 1985

(R)04-30-85 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 84-1673 on April 22, 1985 [1]

(R)06-19-85 Certified copy of order from Clerk, Supreme Court dated June 17, 1985 denying petition for writ of certiorari in SC No. 84-1673 [1]

(T)07-03-85 Letter from Clerk, Supreme Court notifying that an order was entered on July 2, 1985 in SC No. 84-1519 granting the

petition for writ of certiorari and vacating this Court's judgment and remanding [1]

(R)07-29-85 4-Respondent's notification of settlement discussions (m-24) [1]

(R)08-05-85 Certified copy of order from Clerk, Supreme Court advising that the petition for writ of certiorari was granted in SC No. 84-1500 on July 2, 1985 [1]

(R)08-05-85 Certified copy of order from Clerk, Supreme Court advising that the petition for writ of certiorari was granted in SC No. 84-1519 on July 2, 1985 [1]

(R)08-05-85 Certified copy of order from Clerk, Supreme Court entered on July 2, 1985 in SC Nos. 84-1500 and 84-1519 vacating this Court's judgement and remanding [1]

(C)08-13-85 Opinion Per Curiam (On remand from the Supreme Court)

(C)08-13-85 Judgment reinstating the judgment of this Court.

(C)08-13-85 Mandate order.

(F)08-13-85 Per Curiam order that the request to hold this case in abeyance presented in counsel for ContiCommodity Services' letter dated July 24, 1985, and received July 29, 1985 is denied. At this juncture, the case has not become moot, we unquestionably have jurisdiction to act on the Supreme Court's remand, and we had already decided, prior to receipt of the letter request, on the appropriate disposition of the Supreme Court's remand, although our opinion, released today, had not yet issued. (See order for

citations) Ginsburg, CJ; MacKinnon, SCJ; and Parker, U.S. District Judge for the District of Columbia.

(J)08-12-85 4-Letter dated 08-07-85 from counsel for respondent advising of action taken by Supreme Court

(D)10-07-85 MANDATE ISSUED.

(T)10-21-85 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 85-621 on 10/11/85 [1]

(T)10-21-85 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 85-642 on 10/16/85 [1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 80 C 1089

CONTICOMMODITY SERVICES, INC., PLAINTIFF,

v.

MORTGAGE SERVICES OF AMERICA, INC., AND
WILLIAM T. SCHOR, DEFENDANTS.

MOTION TO DISMISS OR TO STAY

NOW COME Defendants, Mortgage Services of America, Inc. and William T. Schor, by their attorneys, and move this Court to dismiss or stay this cause for the following reasons:

1. The parties have entered into a binding agreement requiring that the controversy which is the subject matter of this action be settled by arbitration.

2. There is a prior case pending before the Commodity Futures Trading Commission ("CFTC") between the same parties and involving the same transactions and controversies which are the subject of this action.

Arbitration Clause

1. The plaintiff in this action has entered into written agreements with both of the defendants, copies of which are attached to the Complaint, which govern the relationship between the parties in connection with the commodity accounts maintained with plaintiff by defendants.

2. Paragraph 8 of each of those agreements provide as follows:

"Any controversy between you and me arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules then obtaining, of the American Arbitration Association or the Arbitration Committee of any Exchange on which any order involved therein may have been executed or in which you shall have the benefit of membership. Arbitration must be commenced within one year after the cause of action has accrued by service upon the other of a written demand for arbitration, naming therein the arbitration tribunal."

3. In this action, the plaintiff seeks to recover amounts allegedly due from the defendants in connection with commodity transactions in which the plaintiff acted as broker. This action is plainly a "controversy" between plaintiff and defendants "arising out of or relating to" the Customer's Agreements. The controversy is, therefore, subject to the arbitration clause of the Customer's Agreements.

4. Plaintiff has failed to request or demand arbitration as required in the Customer's Agreements but is bound by such Agreement to settle the controversy which is the subject of this action by arbitration.

Prior Pending Cause

1. On February 21, 1980 defendant Schor and defendant Mortgage Services of America, Inc. both instituted reparations proceedings before the CFTC against plaintiff for damages and losses arising out of commodity futures transactions in which plantiff acted as broker. True and correct copies of the reparations complaints are attached hereto as Exhibits A and B.

2. The transactions which are the subject matter of the reparations complaints are the same transactions which are the subject matter of the Complaint in this cause—Commodity Futures transactions in which plaintiff acted as broker for defendants.

3. Pursuant to the Rules of the CFTC, plaintiff may pursue its purported claim against the defendant for balances allegedly due by filing a counterclaim in the reparations proceedings. No such counterclaim has been filed by the plaintiff.

4. The reparations proceedings are prior pending causes and will fully and completely resolve and adjudicate all of the rights of the parties to this action with respect to the transactions which are the subject matter of this action.

5.This action is merely duplicative of the prior filed reparations proceedings and to permit the continuation of this action would be a waste of judicial effort and an undue burden on the litigants.

6. The continuation of this action, in light of the prior filed reparations proceedings, would be unjust to defendants in that it would require them, at a great cost and expense, to litigate the same issues in two forums. If this action proceeds, defendants will be required pursuant to Rule 13 (a) of the Federal Rules of Civil Procedure to file a counterclaim in this action setting forth all of the claims that they have already filed before the CFTC. The effect would be to emasculate if not destroy the purposes of the Commodity Exchange Act to provide an efficient and relatively inexpensive forum for the resolution of disputes in futures trading.

For the foregoing reasons, defendants respectively move this Court to dismiss this cause or, in the alternative, to stay this cause pending the outcome of a proper arbitration or of the prior filed reparations proceedings.

Stephen M. Merrick

Jerome A. Tatar
Attorneys for defendants

Of Counsel:
Fishman, Merrick, & Perlman, P.C.
30 North La Salle Street
Chicago, Illinois 60602
312-726-1224
[April 18, 1980]

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable John Powers Crowley

Cause No. 80 C 1089 Date June 23, 198

Title of Cause CONTICOMMODITY SERVICES, INC. v. MORTGAGE SERVICES OF AMERICA, INC., et al.

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to n the entry of an order and the names and addresses of their attorneys. Please do this in ately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Defendants' motion to stay or dismiss is denied. Shearson, Hayden Stone, Inc. v. Lumber Merchants In 423 F. Supp. 559 (S.D. Fla. 1976). Defendants are ordered to answer within 15 days. Within 30 days c

Reserve space below for notations by minute clerk

date of this order the parties are ordered to excha lists of all persons who have knowledge of the fac leged in the pleadings. The parties are also orde exchange all relevant documents within their custo control at 10:00 a.m.

The cause is set for a report on status on Augu 1980.

DOCKETED
JUN 24 1980

EXHIBIT B

EASTERN DIVISION

Name of Presiding Judge, Honorable John Powers Crowley

Cause No. 80 C 1089 Date July 3, 1980

Title of Cause CONTICOMMODITY SERVICES, INC. v. MORTGAGE SERVICES OF AMERICA, INC. and WILLIAM T. SCHOR

Brief Statement of Motion Motion for Reconsideration and for Extension of Time to Answer or Otherwise Respond

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel
Stephen M. Merrick
FISHMAN MERRICK & PERLMAN, P.C.
30 North LaSalle Street, Suite 3600
Chicago, Illinois 60602

Representing Attorneys for Defendants

Names and Addresses of other counsel entitled to notice and names of parties they represent.
Robert L. Byman
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
Attorneys for Plaintiff

DOCKETED
JUL 9 1980

Reserve space below for notations by minute clerk

Hearing on defendants' motion for reconsideration held.

For the reasons stated in open court, the motion is denied.

Defendants given to July 31, 1980 to answer the complaint.

Parties are to exchange list of witnesses and all relevant documents in their possession or under their control by August 30, 1980. Status hearing reset to September 26, 1980 at 10:00 a.m.

EXHIBIT C

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 80 C 1089

CONTICOMMODITY SERVICES, INC., PLAINTIFF,

v.

MORTGAGE SERVICES OF AMERICA, INC., AND
WILLIAM T. SCHOR, DEFENDANTS.

MOTION TO DISMISS OR TO STAY

NOW COME Defendants, Mortgage Services of America, Inc. and William T. Schor, by their attorneys, and move this Court for an order dismissing or staying this action by reason of the existence of prior pending actions between the same parties and involving the same claims before the Commodity Trading Commission ("CFTC"). By this motion, defendants renew a motion previously filed with this Court for the reason that there has been a substantial change in circumstances since the previous motion was filed. In support of this motion, defendants state as follows:

1. On April 10, 1980, defendants filed a Motion to Dismiss or Stay this cause on the basis that there were prior causes of action pending before the CFTC involving the same parties and subject matter as are involved in the action before this Court. Copies of the reparations complaints filed before the CFTC are attached to the April 10 Motion to Dismiss or Stay.

2. At the time that defendants filed their Motion to Dismiss or Stay on April 10, 1980, the status of the pleadings in this action and the CFTC action were as follows:

(a) In this action, the only pleading filed was a complaint by plaintiff, ContiCommodity Services, Inc. ("Conti") against Mortgage Services of America, Inc. ("MSA") and William T. Schor ("Schor") claiming that MSA and Schor were indebted to Conti in connection with certain commodity futures transactions in which Conti had acted as broker for MSA and Schor.

(b) There were two proceedings which had been commenced before the CFTC, both reparations claims by MSA and Schor, respectively, against Conti charging violations of the Commodity Exchange Act in connection with the same commodity futures transactions which are the subject of Conti's action in this Court against MSA and Schor.

3. By order dated June 24, 1980 this Court denied defendants' April 10 Motion to Dismiss or Stay and later denied defendants' Motion for Reconsideration. At the hearing on defendants' Motion for Reconsideration, the Court indicated that one of the considerations of the Court in denying the Motion to Dismiss or Stay was that the CFTC actions did not necessarily involve the same claims as those pending before this Court.

4. Since the Court's rulings, Conti has filed pleadings in the CFTC reparations proceedings which defendants believe may be of significance to the Court in its consideration of the question whether this action should be stayed or dismissed. In July, 1980, Conti filed an Answer and Counterclaim in the two CFTC proceedings by MSA and Schor against Conti, copies of which are attached as Exhibits A and B. In addition, Conti filed a Motion to Dismiss the CFTC reparations proceedings by both Schor and MSA; a copy of that motion is attached as Exhibit C.

In the event that this Motion is denied, defendants expect to file a counterclaim against Conti in substantially the form attached as Exhibit D.

5. The reason of the foregoing, is apparent that the identical claims are now before this Court and the CFTC. In its Counterclaims filed against Schor and MSA in the CFTC proceedings, Conti has asserted the same claims as it asserts in its complaint before the Court. Unless this action is stayed or dismissed, the claims which Schor and MSA has made in their reparations proceedings before the CFTC will have to be made by way of defense and counterclaim in this action. There will, therefore, be complete duplication in the two forums.

6. Conti has now requested that the CFTC dismiss the reparations proceedings filed by Schor and MSA because of the pendency of the action before this Court. Even though this action was filed after the reparations proceedings, Conti is now claiming before the CFTC that the same claims are pending in both proceedings, that the claims can be fully resolved before this Court and that, therefore, the reparations proceedings should be dismissed. The implications of this Motion by Conti are of great significance to the regulatory framework under the Commodity Exchange Act. If that motion is granted and this Court takes no action, the result would be that parties have an absolute right to force all controversies under the Commodity Exchange Act out of reparations and into the federal courts.

7. For the foregoing reasons, defendants renew their Motion to Dismiss or Stay this action.

Stephen M. Merrick
One of the Attorneys for
Defendants Mortgage Services
of America, Inc. and William
T. Schor

Of Counsel;
Fishman Merrick & Perlman, P.C.
30 North LaSalle Street
Suite 3600
Chicago, Illinois 60603
726-1224
[July 31, 1980]

BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

Docket No. 80-R567

WILLIAM T. SCHOR, COMPLAINANT,

v.

CONTICOMMODITY SERVICES, INC., AND
RICHARD L. SANDOR, RESPONDENTS.

MOTION FOR DEFAULT, FINDINGS AND REPARATION AWARD

Pursuant to 7 U.S.C.A. § 18(e) and 17 C.F.R. § 12.26(a), the above complainant hereby respectfully moves:

(a) for entry of an Order declaring the above respondents to be in default for failure to file an answer to the complaint in the above-captioned reparation proceeding within the time prescribed;

(b) that a formal adjudicatory proceeding instituted in accordance with 17 C.F.R. § 12.31;

(c) that a Presiding Officer be appointed in accordance with 17 C.F.R. § 12.42;

(d) that the Presiding Officer enter findings and conclusions concerning the questions of violation and damages and enter a reparation award as prayed for in the complaint filed herein. In support of these Motions complaint encloses the filing fee as required in 17 C.F.R. § 12.27 and further states:

1. The complaint in these proceedings was mailed on or about February 18, 1980 and received by the Reparation Unit of the Commodity Futures Trading Commission ("the Commission") on February 21, 1980.

2. On May 7, 1980 the Reparation Unit of the Commision forwarded the complaint herein to the respondents.

3. At the request of counsel for respondent, Conticommodity Services, Inc. ("Conti"), complainant twice agree with said respondent that its time to answer the complaint could be extended from June 21, 1980 ultimately to July 11, 1980.

4. On or about July 10, 1980 counsel for Conti made a third request to counsel for complainant that complainant agreed to a further extension of time in which to respond to complainant's complaint herein and that complainant agree to withdraw its complaint herein and litigate the issues raised herein as a counterclaim in a lawsuit brought after the complaint herein was filed by Conti against complainant in the Federal District Court for the Northern District of Illinois. Complainant refused to agree to such extension and refused to substitute a counterclaim in Conti's subsequent lawsuit for its complaint herein. By letter dated July 10, 1980, a true and correct copy of which is attached hereto as Exhibit "A," complainant advised the Commodity Futures Trading Commission of such refusal to agree to a further extension and the reasons therefor.

5. The Commodity Futures Trading Commission should not permit an untimely answer to complainant's complaint because:

(a) it will delay these proceedings to the prejudice of complainant thus enabling respondents to defeat complainant's right to an inexpensive reparations proceeding by forcing complainant to assert and litigate the claim stated in these proceedings against Conti in a compulsory counterclaim in the subsequent federal court action brought by Conti against complainant;

(b) it will force complainant to litigate the issues raised herein both before the Commision and in the later federal court action brought by Conti since even if those issues are fully litigated in the federal court action on a counterclaim against Conti, respondent Sandor is not a party to that litigation.

(c) it will enable respondent Conti to defeat the intent of the Congress in establishing an inexpensive reparations procedure by the simple expedient of later filing suit against the complainant.

(d) the respondents have no valid reason or excuse for their failure to answer in a timely fashion.

(e) the complainant is entitled to reparations.

(f) Respondent Conti was in default as of July 11, 1980 and respondent Sandor was in default as of June 21, 1980.

WHEREFORE complainant requests that the Commission grant the foregoing motions.

WILLIAM T. SCHOR

By: _____

LESLIE J. CARSON, JR.
Attorney for Complainant
1442 Fidelity Building
123 South Broad Street
Philadelphia, Pa. 19109

[July 24, 1980]

Exhibit A

LESLIE J. CARSON, JR.
ATTORNEY AT LAW
1442 FIDELITY BUILDING
123 SOUTH BROAD STREET
PHILADELPHIA, PENNSYLVANIA 19109

(215) 735-1868

July 10, 1980

Commodity Futures Trading Commision
2033 K Street, N.W.
Washington, D. C. 20581

Attention:
Margaret R.Sandridge
Director, Complaints Section

Re:
Mortgage Services of America and William T. Schor vs. ContiCommodity Services, Inc. (80-R566)

Gentlemen:

Please be advised that counsel for ContiCommodity Services, Inc., has requested and I have refused to agree to a further extension of time in which to answer in the above matter.

The reasons for not agreeing to any further extension are as follows:

1. This is the third request for an extension.

2. After the above claim was filed with the reparations unit, ContiCommodity Services, Inc., filed a suit in the Federal District Court for the Northern District of Illinois

thereby attempting to oust the CFTC of jurisdiction to resolve the issues raised by my clients, Mortgage Services of America and William T. Schor.

3. Any further delay will prejudice my clients since ContiCommodity Services, Inc., has advised that the case in Illinois will move ahead very quickly and any delay in the CFTC proceedings may result in a CFTC decision being delayed until after the Federal Court decision, even though the CFTC reparations complaint was filed long before that in the Federal District Court.

4. The result of the filing of the Federal District Court action by ContiCommodity Services, Inc., may be to deprive my clients of the inexpensive and expeditious resolution of their complaints intended by Congress in the Commodity Futures Trading Commission action.

Very truly yours,

LESLIE J. CARSON, JR.

LJC/pt
cc: John K. Eggers
William T. Schor
Stephen M. Merrick

BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

Docket No. 80-R567

WILLIAM T. SCHOR, COMPLAINANT,

v.

CONTICOMMODITY SERVICES, INC., AND
RICHARD L. SANDOR, RESPONDENTS.

COMPLAINANT'S MOTION THAT PREVIOUSLY FILED MOTION FOR DEFAULT, FINDINGS AND REPARATION AWARD BE GRANTED AS MADE

Pursuant to 7 U.S.C.A. § 18(e) and 17 C.F.R. § 12.26(a), the above Complainant hereby respectfully moves that the Motion for Default, Findings and Reparation Award previously filed by Complainant be granted and in support thereof avers the following:

1. The aforesaid Motion filed and served on respondents by mail on July 24, 1980. True and correct copies of said Motion, with the letter transmitting it to the Complaints Division and the check submitted therewith are attached hereto as Exhibit I.

2. The averments and requests for relief contained in the attached Motion for Default are incorporated herein and reiterated in this Motion.

3. No answer by Respondents to said Motion for Default has been filed and as required by 17 C.F.R. § 12.46 Respondent registrants must be deemed to have consented to the relief sought by the Motion.

4. The Answer and Counterclaim untimely filed by Respondents must be stricken as null and void pursuant to 17 C.F.R. § 12.26.

5. On August 7, 1980 the Director of the Complaint Sections, Margaret R. Sandridge responded to the Motion for Default, Findings and Reparation Award as reproduced in Exhibit II hereto, advising, inter alia, that notice would be given shortly as to whether the facts warrant an adjudicatory hearing.

6. On September 11 and 22, 1980 the Commodity Futures Trading Commission notified, as reproduced in Exhibits III and IV hereto, Complainant that the case has been forwarded to the Office of Hearings and Appeals for the institution of formal adjudicatory and requested that the filing fee be forwarded.

7. On September 18, 1980 the filing fee requested was forwarded by Complainant as set forth in the letter of transmittal reproduced as Exhibit V hereto.

8. The Complaint herein was filed and received by the Reparations Unit on February 21, 1980 but on March 4, 1980 Registrant, Conticommodity Services, Inc., filed a lawsuit against Complainant based on the transactions which are the subject matter of the Complaint for Reparations. Said lawsuit was filed in the Federal District court for the Northern District of Illinois.

9. The Complainant herein has moved for dimissal and for stay of the proceedings in the Federal District Court pending decision in the instant reparations proceeding but the Federal District Court has denied those motions.

10. The Counterclaim attempted to be filed by the Registrants in this reparations proceeding is identical in substance to the Complaint filed by the Registrant, Conticommodity Services, Inc. in the Federal Court.

11. Permitting Registrants to file untimely their Answer and Counterclaim, particularly when coupled with the commencement of a lawsuit by one Registrant against Complainant after the filing of this Reparations pro-

ceeding, will prejudice Complainant and may deprive Complainant of the right to an adjudication in the reparations forum.

WHEREFORE Complainant renews its Motion for Default, Findings and Reparation Award and Respectfully Requests that it be granted promptly to preserve Complainant's rights herein.

WILLIAM T. SCHOR

By: _____
LESLIE J. CARSON, JR.
Attorney for Complainant
6378 Lancaster Avenue
Philadelphia, Pennsylvania 19151

[November 6, 1980]

BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

[Docket No. 80-R566]

MORTGAGE SERVICES OF AMERICA, INC., COMPLAINANT,

v.

CONTICOMMODITY SERVICES, INC., AND
RICHARD L. SANDOR, RESPONDENTS.

ANSWER TO COMPLAINT AND COUNTERCLAIM

Respondents, ContiCommodity Services, Inc. ("Conti") and Richard L. Sandor ("Sandor") answer the complaint filed with the Commission on February 15, 1980 by Mortgage Services of America, Inc. ("Mortgage Services") as follows:

* * * * *

COUNTERCLAIM

As its counterclaim against Mortgage Services, Conti states as follows:

1. On or about September 2, 1976, Mortgage Services and Conti entered into a customer's agreement (a copy of which is attached to Mortgage Services' complaint), pursuant to which Conti opened an account on behalf of Mortgage Services and began the execution of Mortgage Services' orders on various commodities exchanges pursuant to Mortgage Services' instructions.

2. On or about October 9, 1979, Mortgage Services' account went into deficit and Mortgage Services had failed to and refused to meet margin calls.

3. Pursuant to the customer's agreement, Conti liquidated Mortgage Services' positions, resulting in a deficit balance in the account of $55,955.60.

Wherefore, Conti prays for entry of an order against Mortgage Services in the amount of $55,955.60, together with interest, costs and reasonable attorneys' fees, and for such other and further relief as may be just.

CONTICOMMODITY SERVICES, INC.
AND RICHARD L. SANDOR

By: _____
One of their attorneys

Robert L. Byman
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

[July 17, 1980]

BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

[Docket No. 80-R567]

WILLIAM T. SCHOR, COMPLAINANT,

v.

CONTICOMMODITY SERVICES, INC., AND
RICHARD L. SANDOR, RESPONDENTS.

ANSWER TO COMPLAINT AND COUNTERCLAIM

Respondents, ContiCommodity Services, Inc. ("Conti") and Richard L. Sandor ("Sandor") answer the complaint filed with the Commission on February 15, 1980 by Mortgage Services of America, Inc. ("Mortgage Services") as follows:

* * * * *

COUNTERCLAIM

As its counterclaim against Schor, Conti states as follows:

1. On or about September 2, 1976, Schor and Conti entered into a customer's agreement (a copy of which is attached to Schor's complaint), pursuant to which Conti opened an account on behalf of Schor and began the execution of Schor's orders on various commodities exchanges pursuant to Schor's instructions.

2. On or about October 9, 1979, Schor's account went into deficit and Schor failed to and refused to meet margin calls.

3. Pursuant to the customer's agreement, Conti liquidated Schor's positions, resulting in a deficit balance in Schor's account of $36,393.77.

WHEREFORE, Conti prays for entry of an order against Schor in the amount of $36,393.77, together with interest, costs and reasonable attorneys' fees, and for such other and further relief as may be just.

CONTICOMMODITY SERVICES, INC.
AND RICHARD L. SANDOR

By: _____
One of their attorneys

Robert L. Byman
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

[July 17, 1980]

BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

Docket No. 80-R566

MORTGAGE SERVICES OF AMERICA, INC., COMPLAINANT,

v.

CONTICOMMODITY SERVICES, INC., AND
RICHARD L. SANDOR, RESPONDENTS.

REPLY TO COUNTERCLAIM

1. Admitted.

2. Denied. On the contrary, as indicated by the monthly statement of Conticommodity Services, Inc. (CONTI) for Mortgage Services of America (MSA) for the month ending October 31, 1979, the account of MSA was not in deficit but had a credit balance on October 9, 1979 of $141,372.20 which rose on October 10, 1979 to $156,697.20. All transactions after October 10, 1979 were executed by CONTI and Richard L. Sandor (Sandor) without authority from MSA. Failure to execute the orders which MSA tried to place with CONTI and Sandor on October 8, 1979 as averred in MSA's complaint herein, together with the unauthorized trades made after October 9, 1979, were the cause of all deficits and losses suffered by MSA in said account. Moreover, on October 9, 1979, there were no outstanding unmet margin calls addressed to MSA by CONTI.

3. Denied as stated. It is admitted that CONTI liquidated MSA's position, but it is denied that such liquidation was pursuant to the customer's agreement. On the

contrary, such liquidation was in violation of CONTI's and SANDOR's duties to MSA as a customer. It is denied that there is a deficit balance in MSA's account. On the contrary, the balance in the account as of December 3, 1979 was zero, as set forth in the CONTI statement of MSA's account for the month ending December 31, 1979 which is attached to the Complaint filed herein.

WHEREFORE MSA prays that the counterclaim of CONTI be denied and renews its prayer in the Complaint filed herein.

MORTGAGE SERVICES OF AMERICA, INC.

By: _____
WILLIAM T. SCHOR
President

Attorney: LESLIE J. CARSON, JR.
1442 Fidelity Building
123 S. Broad Street
Philadelphia, Pa. 19109
(215) 735-4868

[August 14, 1980]

BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

Docket No. 80-R567

WILLIAM T. SCHOR, COMPLAINANT

v.

CONTICOMMODITY SERVICES, INC., AND
RICHARD L. SANDOR, RESPONDENTS

REPLY TO COUNTERCLAIM

1. Admitted.
2. Denied. On the contrary, as indicated by the monthly statement of Conticommodity Services, Inc. (CONTI) for William T. Schor (SCHOR) for the month ending October 31, 1979, the account of SCHOR was not in deficit but had a credit balance on October 9, 1979 of $126,025.68. All transactions after October 9, 1979 were executed by CONTI and Richard L. Sandor (SANDOR) without authority from SCHOR. Failure to execute the orders which SCHOR tried to place with CONTI and SANDOR on October 8, 1979 as averred in SCHOR's Complaint herein, together with the unauthorized trades made after October 9, 1979, were the cause of all deficits and losses suffered by SCHOR in said account. Moreover, on October 9, 1979, there were no outstanding unmet margin calls addressed to SCHOR by CONTI.
3. Denied as stated. It is admitted that CONTI liquidated SCHOR's position, but it is denied that such liquidation was pursuant to the customer's agreement. On the contrary, such liquidation was in violation of CONTI's and SANDOR's duties to SCHOR as a customer.

WHEREFORE SCHOR prays that the counterclaim of CONTI be denied and renews his prayer in the Complaint filed herein.

WILLIAM T. SCHOR

Attorney: LESLIE J. CARSON, JR.
1442 Fidelity Building
123 South Broad Street
Philadelphia, Pa. 19109
(215) 735-4868

[August 14, 1980]

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

CFTC Docket No. 80-R566-80-723

MORTGAGE SERVICES OF AMERICA,
AND
WILLIAM T. SCHOR COMPLAINANTS,
v.
CONTICOMMODITY SERVICES, INC., AND
RICHARD L. SANDOR, RESPONDENTS.

Washington D.C.
March 16, 1981

The above-entitled matter convened in Hearing Room No. 540, 2120 L Street, Gelman Building, Washington, D.C. at 1 o'clock on Monday, March 16, 1981

BEFORE: GEORGE H. PAINTER, Administrative Law Judge

APPEARANCES:

ON BEHALF OF THE COMPLAINANTS:

LESLIE J. CARSON, JR., Esquire
1004 Robinson Building
42 South 15th Street
Philadelphia, Pennsylvania 19102

ON BEHALF OF THE RESPONDENTS:

BY: ROBERT L. BYMAN, Esquire
EUGENE R. WEDOFF, Esquire
Jenner and Block
One IBM Plaza
Chicago, Illinois 60611

[192] * * * * * *

Q. If they had demanded that funding, and it had not appeared, and they had liquidated, what would have been the impact—well, first of all, when should they have demanded the funds to fully margin this account, given this long period of under-margining?

MR. BYMAN: Your Honor, I'm going to object to this question, unless there's a definition of what's standard and what should—

JUDGE PAINTER: The word "should," does bother me, Mr. Carson, because it implies perhaps a legal obligation to do something, and are you wanting Ms. Jordan to tell us that legally Conti should have enforced its demand? Are you trying to prove here that there was a violation of the Act by permitting those accounts to become under-margined to any extent?

MR. CARSON: Not to any extent, but to the extent that it was under-margined here.

JUDGE PAINTER: And this is a violation of the Commodity Exchange Act? Is it your contention that permitting an account to become—

MR. CARSON: Yes, Your Honor.

MR. BYMAN: I will tell Your Honor that there is no such requirement under the Act and the question is therefore improper.

JUDGE PAINTER: I am unaware of any such requirement. [193] Most lawyers know more than I do, and I am willing to learn.

MR. CARSON: Well, if I may just continue.

JUDGE PAINTER: When you use the word "should," are you suggesting then that you want a legal response?

MR. CARSON: No, Your Honor. I want a response with respect to the practice in the industry.

JUDGE PAINTER: Good business judgment on the part of the industry.

MR. CARSON: Good business judgment.

JUDGE PAINTER: All right, Ms. Jordan.

THE WITNESS: The question is when would good industry practice—

BY MR. CARSON:

Q. Let me ask it. When would good industry practice and good business judgment have militated towards Conti demanding that the margin deficit be eliminated or the account be liquidated, in the period starting September 14, 1979 to the end of the account?

A. Okay. For Conti to liquidate a customer's account, they should first inquire if the customer intends to send money, if they have faith in the customer being good for his word. I believe that Conti is fair in continuing to allow it to remain like that, being reasonable that the money is coming.

That did happen on 9/20, so I would eliminate any-[194] thing before 9/20, because he must have told them before 9/20 I'm sending money, the money came, Mr. Schor is good for his word.

The account didn't start getting significantly under-margined again until 9/26, and then it was largely under-margined on 9/27 and it never recovered. So, I would say five days from that point in time.

* * * * * *

[342] MR. WEDOFF: Yes, Your Honor, and these decisions as I read them talk about the award of attorney fees as an incident to the litigation, and what we are claiming here is a right to attorney fees based on our customer agreement and contractual right.

The Commission based its decision on the United States Supreme Court decision and the Aleuska case, and talked about the ordinary American rule that attorney fees be not

awarded as an instance [*sic*] of litigation. But the Aleuska case and the general American rule recognizes that if parties contract to pay attorney fees as an incident of their doing business, that a court can award attorney fees.

Now, in this situation, we're not claiming an award based on a violation of the Commodity Exchange Act—

JUDGE PAINTER: Is there any counterclaim based on the violation of the Commodity Exchange Act?

MR. WEDOFF: No, our counterclaim is based simply on [343] a contractual right and the Commodity Exchange Act in reparation proceedings, as I understand it, Your Honor, allows us to bring as a counterclaim any claim that we have arising out of the factual matters that were raised in the Complaint.

And that's what we've done here. We're not claiming that Mr. Schor violated the Commodity Exchange Act. We're simply finding that he owes us a deficit arising out of the circumstances that he brought up.

And in connection with that deficit, which is a contractual claim on our part, we're making additional contractual claims that he is obligated to pay us the attorney fees that were connected with our collecting the deficit.

MR. BYMAN: May I suggest, Your Honor, that perhaps it should be a matter for our briefs to address as to whether we're entitled to it; we're simply asking for leave to file with our briefs an affidavit so that if your Honor finds that we're entitled to it; we'll have some measure by which to gauge our rights to those fees.

JUDGE PAINTER: You may attach it to your post-hearing briefs, but it is most unlikely that I would award attorney fees.

MR. BYMAN: We'll attempt to convince you otherwise in our brief.

* * * * * *

CFTC Regulation 12.24, 17 C.F.R. 12.24 (1980), provided:

Reply.

> If the answer asserts a counterclaim, the complainant shall file a reply to the counterclaim with the Commission within thirty (30) days after service of the answer. The reply shall be strictly confined to the matters alleged in the counterclaim, and shall in all respects conform to the requirements set forth in § 12.23(b) with respect to the form and content and other requirements concerning an answer. A complainant may satisfy a counterclaim, as if it were a complaint, in the manner set forth in § 12.23(a).

CFTC Regulation 12.26(a), 17 C.F.R. 12.26(a) (1980), provided:

Effect of failure to file answer or reply; default.

> (a) *Findings and conclusions.* Failure timely to file an answer to a complaint or a reply to a counterclaim shall be treated as an admission of the allegations of the complaint or counterclaim, shall constitute a waiver of hearing on the facts set forth in the complaint or counterclaim, and shall result in the institution of a formal adjudicatory proceeding in accordance with § 12.31 upon the payment of the appropriate filing fee set forth in § 12.27 by either the complainant or registrant. The previously forwarded complaint, and the answer if no reply has been filed to a counterclaim set forth in the answer, shall be deemed to have been served for purposes of the institution of a formal adjudicatory proceeding. The proceeding shall be docketed in accordance with § 12.41 and a Presiding Officer shall be appointed in accordance with § 12.42. The Presiding Officer may thereafter, upon the motion of complaining party, enter findings and conclusions concerning the questions of violation and damages and may enter an

appropriate reparation award. If the facts which are treated as admitted are considered insufficient to support the amount of reparations sought, the proceeding may continue on the question of damages only.

Supreme Court of the United States

No. 85-621

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

ORDER ALLOWING CERTIORARI. FILED DECEMBER 9, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Supreme Court of the United States

No. 85-642

COMMODITY SERVICES, INC., PETITIONER

v.

WILLIAM T. SCHOR AND MORTAGE SERVICES OF AMERICA

ORDER ALLOWING CERTIORARI. FILED DECEMBER 9, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1986 - 491-507:20514

(3)

No. 85-642

In the

Supreme Court of the United States

OCTOBER TERM 1985

CONTICOMMODITY SERVICES, INC.,

Petitioner,

v.

WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF PETITIONER

HOWARD R. BARRON
ROBERT L. BYMAN*
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Petitioner ContiCommodity Services, Inc.
*Counsel of Record

Of Counsel:
LAWRENCE G. WEPPLER
CHIEF COUNSEL
CONTICOMMODITY SERVICES, INC.
10 South Riverside Plaza
Chicago, Illinois 60606

January 23, 1986

CHAS. P. YOUNG CHICAGO

QUESTION PRESENTED

Whether Article III of the U.S. Constitution prohibits Congress from providing for the adjudication of incidental common law counterclaims as a part of a voluntarily elected reparations procedure designed to provide a forum for the speedy and efficient resolution of controversies arising under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*

PARTIES IN THE PROCEEDING BELOW

Petitioner ContiCommodity Services, Inc. was a respondent in the proceeding below in the United States Court of Appeals for the District of Columbia Circuit. Other respondents were the Commodity Futures Trading Commission and Richard L. Sandor. William T. Schor and Mortgage Services of America were petitioners in the proceeding below.

ContiCommodity Services, Inc. is a Delaware corporation wholly owned by Continental Grain Company, a Delaware corporation, and has the following subsidiaries and/or affiliates: ContiCommodity Services AG; ContiCommodity Services S.A.; and ContiCommodity Services (U.K.) Ltd.

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TABLE OF AUTHORITIES

No. 85-642

In the

Supreme Court of the United States

OCTOBER TERM 1985

CONTICOMMODITY SERVICES, INC.

Petitioner,

v.

WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF PETITIONER

ContiCommodity Services, Inc. ("Conti") respectfully submits this brief in support of its prayer that the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case be vacated.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 740 F.2d 1262 and at 770 F.2d 211. The order of the Court of

Appeals denying the suggestions for rehearing *en banc* of the Court's initial decision is unofficially reported at 2 Comm. Fut. L. Rep. (CCH) § 22,409. The decision of the Administrative Law Judge ("ALJ") (Pet. App. G)[1] is unreported. The order of the Commodity Futures Trading Commission denying review of the ALJ decision is unofficially reported at [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 21,823.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. F) was entered on August 13, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant constitutional provisions, statutes and regulations (reproduced at Pet. App. H) are Article III, § 1 of the U.S. Constitution, § 14 of the Commodity Exchange Act, 7 U.S.C. § 18, and Regulation 12.23(b)(2) of the Commodity Futures Trading Commission.[2]

STATEMENT OF THE CASE

In order to regulate the growing commodities futures industry and to protect the investing public, Congress revamped the Commodity Exchange Act in 1974 with the adoption of the Commodity Futures Trading Act, 7 U.S.C. § 1 *et seq.* (the "Act"). As an integral part of the Act,

[1] References to materials reproduced in the Appendix to the Petition for Certiorari in this case are made as "Pet. App. ——."

[2] The relevant subject matter of Regulation 12.23(b)(2) is now codified, effective April 23, 1984, in Regulation 12.19, 17 C.F.R. § 12.19 (1984). Section 14 of the Commodity Exchange Act is relevant both as it existed at the time of the transactions here and as amended in 1983. The past and present texts of the statute and the regulations are reproduced in the Petition Appendix.

Congress created the Commodity Futures Trading Commission (the "Commission") and directed it to adopt regulations to create a reparations process as an additional dispute resolution forum, to supplement the existing forums of the courts and arbitration. Although not required to pursue a remedy in reparations, the Act allowed a customer of a commodities firm to elect to bring a reparations complaint to redress violations of the Act in a forum designed to provide a speedy and efficient alternative to litigation.

In keeping with Congress's goal of efficient dispute resolution, the Commission promulgated a regulation in 1976 to permit the Commission, once a customer had elected to invoke the reparations procedure, to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2) (1983)). Pursuant to its regulations, the Commission has routinely heard counterclaims which involve common law claims such as claims for debit balances in a customer's account.

William T. Schor and Mortgage Services of America (collectively "Schor"[3] maintained commodities futures trading accounts with Conti. Schor incurred significant trading losses, and after the accounts were closed, there remained a deficit balance due Conti of approximately $90,000. (Pet. App. B, p. 2-3). Schor and Conti each initially turned to a different forum to assert their respective positions. Conti filed an action to recover the deficit balance in the United States District Court for the Northern District of Illinois; Schor filed a reparations complaint before the Commission seeking $1.8 million in damages for alleged violations of the Act. (Pet. App. B, p. 2, 5, n.6.)

[3] Separate accounts, and separate actions, were maintained by William T. Schor and his 90%-owned company, Mortgage Services of America. For simplicity, these separate entities and actions will be referred to throughout as "Schor."

Schor moved to dismiss Conti's federal court action on the ground that the reparation action was filed first and Conti's action could be asserted as a counterclaim in the reparation proceeding. Although the district court denied Schor's motion, Conti voluntarily dismissed its federal action and filed a counterclaim in reparations, since reparations offered speedier adjudication than could the federal court. (Pet. App. B, p. 5, n.6; J, p. 1). After a three-day trial, the Administrative Law Judge ruled against Schor on all counts and in favor of Conti on its counterclaim. (Pet. App. B, p. 5.)

Schor sought review of the ALJ's decision before the full Commission. After the Commission declined review, Schor appealed to the United States Court of Appeals for the District of Columbia Circuit, pursuant to § 14(e) of the Act, 7 U.S.C. § 18(e) (1982).

Although the parties had not themselves raised the issue, the Court of Appeals on its own motion directed the parties to address whether Article III of the United States Constitution, as interpreted by this Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("*Northern Pipeline*"), permitted adjudication by the Commission of common law counterclaims.

On August 10, 1984, a panel of the Court of Appeals held that the Commission's regulation permitting common law counterclaims is an impermissible extension of Congressional authority. Although the statute and legislative history specifically and expressly refer to such counterclaims, the panel overlooked the relevant history and found that Congress had not clearly manifested its intent to authorize Commission adjudication of common law counterclaims:

> Discovering no explicit congressional intention to do so, we conclude that the CEA [the Act] does not authorize the Commission to adjudicate Conti's breach of contract counterclaims. (Pet. App. B, p. 12.)

The panel declined, therefore, to actually reach the question of whether the Congressional grant of counterclaim

authority would violate Article III as construed by *Northern Pipeline*. In so doing, however, the court below did not consider an express reference in the legislative history of the Act in which Congress stated its understanding that the Commission is authorized to hear all counterclaims arising out of the subject matter of disputes in reparations. When the Act was amended in 1983 (after this Court's ruling in *Northern Pipeline*), the House Committee Report reviewed the status and the purpose of counterclaims in connection with an amendment to enhance enforcement provisions:

> [S]ince the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts, the bill would create appropriate sanctions against a claimant who has failed to honor a reparations award in favor of the counterclaimant.

H.R. Rep. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904 (emphasis added); *See also* S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982).

When Congress created the reparations remedy in 1974, it intended to provide a forum for efficient and expeditious adjudication of customer claims. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978). In keeping with this purpose, Congress expressly provided in the 1974 amendments that the Commission would have jurisdiction to hear counterclaims brought by a broker against its customer. The Act, as amended in 1974, required a nonresident complainant to post a bond double the amount of the claim to cover costs and attorneys' fees if the respondent prevails and to pay any reparation award entered against the complainant "on any counterclaim." Pub. L. No. 93-463, § 106, 88 Stat. 1389 (1974) (codified at 7 U.S.C. § 18(d) (1976)).

In its 1974 enactment, Congress did not attempt to enumerate the types of counterclaims which are within the jurisdiction of the Commission. Instead, Congress directed the Commission to adopt appropriate regulations defining its

counterclaim jurisdiction. The House Committee on Agriculture, which sponsored the bill, stated in its report:

> Counterclaims will be recognized in the proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

H.R. Rep. No. 975, 93rd Cong., 2d Sess. 23 (1974).

In 1976, the Commission adopted Regulation 12.23(b)(2), which provides:

> an answer may set forth as a counterclaim facts alleging a violation and a request for reparation award that would be a proper subject for a complaint under § 12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2) (1983)). In its regulation the Commission borrowed from Rule 13(a) of the Federal Rules of Civil Procedure, which defines a counterclaim as one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed.R.Civ.P. 13(a).

In 1983, Congress extended the authorization of the Commission for an additional four years and amended the reparations provisions of the Act by adding a section permitting the Commission to promulgate "such rules, regulations and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section." Pub. L. No. 97-444, § 231(b), 96 Stat. 2319 (1983) (codified at 7 U.S.C. § 18(b) (1982)). Congress concluded that such a grant of broad discretion would enable the Commission to streamline the reparations process. *See* H.R. Rep. No. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. &

Ad News 3871, 3904; S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982). The new section expressly authorized the Commission "without limitation" to promulgate rules and regulations concerning "the nature and scope of . . . counterclaims . . . ." Pub. L. No. 97-444, § 231(b), 96 Stat. 2319 (1982) (codified at 7 U.S.C. § 18(b) (1982)).

The 1983 amendments also provided a new method for enforcing a counterclaim award. The Act, as it existed before the 1983 amendments, penalized a registered broker who failed either to pay a reparations award or to file a timely notice of appeal. Under those circumstances, the Act prohibited the broker from trading on the contract markets and suspended his registration until he complied with the Commission's order. *See* 7 U.S.C. § 18(b) (1976). The prior Act did not, however, penalize a customer who failed to pay a counterclaim award. The 1983 amendments corrected this inequity by providing that any party who fails to pay a reparation award be barred automatically from trading on all contract markets. *See* Pub. L. No. 97-444, § 231(f), 96 Stat. 3219-20 (1983) (to be codified at 7 U.S.C. § 18(b) (1982)).

Despite this legislative history and despite the statement of Congress that "the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts," *supra*, p. 5, the Court of Appeals determined that there was no congressional intention to extend authority to the Commission to hear common law counterclaims. Although this key bit of legislative history was cited to the Court of Appeals (Commission Br., pp. 21-22), the court below did not discuss the passage in its analysis.

Similarly, the Court of Appeals ignored the fact that Schor had opposed Conti's separate federal action on the ground that the action could be brought as a reparations counterclaim. Without discussion of this fact, the Court of Appeals concluded that Schor had not freely consented to the Commission's jurisdiction. (Pet. App. B, p. 25.)

Conti and the Commission each sought rehearing from the Court of Appeals. Although the petitions failed to receive sufficient votes for rehearing, Judge Wald, with Judge Starr concurring, filed a statement as to why rehearing *en banc* should have been granted:

> In sum, this is, so far as I know, the first major extension of [*Northern Pipeline*] to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas. I believe the case deserves *en banc* consideration. (Pet. App. C, p. 3.)

Conti and the Commission each petitioned for a writ of certiorari. On July 2, 1984, the court granted the writs, vacated the judgment below, and remanded for further consideration in light of *Thomas* v. *Union Carbide*, 473 U.S. —, 105 S. Ct. 3325 (1985) ("*Thomas*") (Pet. App. D). On August 13, 1985 the same panel which had rendered the original judgment reinstated that judgment. (Pet. App. E.)

SUMMARY OF ARGUMENT

The Court of Appeals' decision reaches far beyond the monetary rights of the individual litigants. It eviscerates the statutory scheme designed by Congress for dispute resolution in the commodities industry and will necessarily impact upon any other attempt by Congress to create similar procedures in other substantive areas.

Submission to reparations is a voluntary process to which the litigant must consent. This Court's opinions in *Thomas*, *Northern Pipeline* and earlier cases remove any Article III concerns as to the procedure established here by Congress;

the Court of Appeals' holding, therefore, is in conflict with this Court's holdings. To the extent that *Thomas* and *Northern Pipeline* did not settle that issue, however, this Court should settle this important question once and for all by squarely holding that litigants may consent to submission of disputes to non-Article III forums and that such consent may be implied by the voluntary election of a process which provides for the adjudication of counterclaims.

Even if the Court should find that the Court of Appeals is correct, however, that holding should only be applied prospectively and should not operate to invalidate the award on Conti's counterclaim.

ARGUMENT

I. The Decision Below Erroneously Invalidates An Act Of Congress.

In reaching its judgment in the present case, the Court of Appeals opined that Congress cannot permissibly establish a voluntary forum for dispute resolution which includes resolution of related common law counterclaims unless the adjudicatory body is vested with Article III safeguards. In so doing, the Court of Appeals invalidated an Act of Congress designed to provide a forum for countless past and potential future litigants in an important area of commercial enterprise and has cast an impenetrable barrier upon any attempt by Congress to create similar dispute resolution forums in other areas of commerce and society.

Congress created the reparations remedy with the intention that the process provide aggrieved customers of commodity firms with a voluntary alternative to litigation, which would be less expensive and speedier than litigation. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978). Pursuant to its legislative authority, the Commission adopted regulations to establish a reparations unit to handle these claims through a team of administrative law judges who have expertise in the unique jargon, principles, and mechanics of the commodities industry. Congress further provided

that counterclaims arising out of the same commodities transactions be handled as part of the reparations process. Without such a provision, that process would be practically eviscerated. A customer could not be expected to elect his remedy in reparations if the brokerage firm could, and of necessity must, bring a separate federal action for what would otherwise be a reparations counterclaim. Moreover, the existence of compulsory counterclaims, Fed. R.Civ.P. 13(a), could force the customer to counterclaim in any federal action brought by the brokerage house. Thus, without the ability to resolve the entire dispute, and with the virtual certainty that many reparations actions would be accompanied by separate court actions which would require simultaneous litigation of the same issues before two different tribunals, the rights afforded to claimants by Congress would be totally emasculated.

Although the original opinion below (Pet. App. B) is carefully crafted to appear that no constitutional question is presented, that result was reached only upon the court's inexplicable failure to address the unambiguous legislative history of the Act.

The Court of Appeals professed to find ambiguity in the legislative history of the Act by ignoring the one key passage of that history which removes any possible doubt. The court below ignored the reference which had been cited to it in the briefs which explained that "the reparation program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts." H.R. Rep. 565, 97th Cong. 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904. The Court of Appeals' total disregard of this passage is inexplicable.

At the time that it amended the Act in 1983, Congress knew that the Commission had construed its statutory jurisdiction to extend to the adjudication of all counterclaims arising out of the transaction or occurrence described in a reparations complaint. Congress specifically approved of such jurisdiction since it was in total harmony with the basic

purpose of reparations to pass upon the entire controversy surrounding each claim. In circumstances such as these, where Congress had manifested a continuing concern and intention over a period of years and has confirmed that intention when revisiting the statute, such subsequent legislative history is entitled to significant weight. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *Seatrain Shipbuilding Corp.* v. *Shell Oil Company*, 444 U.S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 (1968).

There is no question that the Court of Appeals' decision invalidates an act of Congress as surely as if there had been an express holding to that effect. In the minority statement filed by Judge Wald as to *en banc* review, she observed:

> I would hear this case *en banc* because it results in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act ("CFTA") violations. The reparations provision has, since 1974, provided an administrative forum as an alternative to the courts for such victims to recover their losses. As a practically necessary corollary, it empowers the agency to decide counterclaims arising out of the transactions complained of and affecting the account from which the reparations will be paid. To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense in the fastmoving money world and will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims. The faster and less expensive alternative forum will be decimated.

(Pet. App. C, p. 2) (emphasis in original).

Although the Court of Appeals' decision is not technically binding in other circuits, the practical reality of the judgment will prevent the present issue from arising in other

circuits so that it might be further refined in the courts of appeals. In the wake of the present judgment, it is unclear whether the Commission will accept common law counterclaims in reparations actions. Even if it were to do so, and even as to cases already pending in the administrative pipeline, however, no prudent litigant, faced with the uncertainty created by the Court of Appeals' decision, would rely upon a reparations counterclaim to enforce its rights. Rather, litigants will of necessity be forced to bring separate federal actions to pursue the claims they would otherwise have brought as reparation counterclaims.

The Court of Appeals' decision also casts a cloud upon other forms of alternative dispute resolution, ranging from traditional forms of arbitration to the new and innovative methods which are being currently developed in an effort to unclog the overburdened court system. If, under the Court of Appeals' decision, litigants may not permissibly turn to a voluntary congressionally created dispute resolution forum, litigants must also question whether an arbitration award may be subject to a challenge for subject matter jurisdiction when an attempt is made to enforce the award through the federal courts pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982). Where any doubt exists as to the potential validity of the alternative forum, litigants will be forced to turn instead to the courts.

In one fell swoop, therefore, the decision of the Court of Appeals eviscerates an Act of Congress, deprives future litigants of a speedy and efficient forum for dispute resolution, burdens the federal courts with litigation they would otherwise not be likely to receive, and unleashes serious questions as to perhaps hundreds of judgments which the litigants had long ago assumed were settled. Further, the decision casts a shroud over all other present and future alternative dispute resolution procedures.

The Court of Appeals erred when it ignored the plain language and legislative history of the Act and concluded that Congress did not intend in 1974 for the Commission to

exercise jurisdiction over ancillary common law counterclaims.

A. *Submission Of Common Law Counterclaims To Commission Reparations Is Consensual.*

The Court of Appeals also erroneously found that the hearing of counterclaims is not consensual, by ignoring the undisputed record on that subject. In the instant case, Schor elected, as do all reparations complainants, to have his claim adjudicated in a reparations proceeding. In so doing, he expressly consented to the submission of his reparations claim to a non-Article III tribunal. In addition, he necessarily consented to adjudication by the Commission of any counterclaim against him.

Certainly, at the time that he filed his reparations claim, Schor knew that Conti could assert a counterclaim against him in a reparations proceeding. The then-current regulations of the Commission empowered the adjudication of a counterclaim if it "arise[s] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (codified in 17 C.F.R. § 12.23(b)(a) (1983)).

Moreover, Schor expressly *demanded* that Conti proceed on its counterclaim in reparations rather than before an Article III court. Before it learned that Schor had filed a reparations claim, Conti had already filed suit in the United States District Court for the Northern District of Illinois to collect the deficit in Schor's account. Schor moved to dismiss the federal action on the ground that Conti should be required to seek relief by filing a counterclaim in reparations. (Pet. App. J, p. 1). The district court denied the motion. Nevertheless, because the reparations trial was scheduled before the court trial, and in reliance upon assurances from Schor that Conti could assert its claim as a counterclaim in reparations, Conti voluntarily dismissed its federal court action. Under these circumstances, the panel was patently incorrect when it concluded (Pet. App. B, p. 25)

that Schor did not knowingly consent to adjudication of Conti's counterclaim by the Commission.

A claimant need not invoke the Commission's reparations jurisdiction, but when he does, he necessarily consents to "take the bitter with the sweet." *Arnett* v. *Kennedy*, 426 U.S. 134, 153-54 (1974). So long as a claimant remains free to avail himself of the choice of presenting his claims to an Article III court, the additional right to have his claim adjudicated by the Commission, subject to the possibility that a counterclaim will be filed and decided, can no more offend Article III than does voluntary submission to arbitration, with the attendant possibility of a counterclaim.

B. *Litigant Consent Obviates Article III Concerns.*

In reaching its conclusion that common law counterclaims cannot be heard in reparations even with litigant consent, the Court of Appeals looked for but professed to find no guidance in *Northern Pipeline* or elsewhere in this Court's prior decisions in dealing with the litigant consent issue (Pet. App. B, p. 24):

> The most we can fairly say of *Northern Pipeline* is that it provides no "determinative principle" for evaluating the constitutionality of non-Article III adjudicatory schemes that operate only with the litigants' consent.

If, as the Court of Appeals found, the issue was not adequately settled in *Northern Pipeline*, it certainly was in *Thomas*, when Justice O'Connor stated the holding of *Northern Pipeline*:

> The Court's holding in that case [*Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review.

Thomas, at 105 S. Ct. 3334-35. (Emphasis added.) The Court of Appeals ignored this clarifying language on remand.

Northern Pipeline did not command a majority opinion but was decided with the confluence of a plurality opinion and a concurring opinion. The plurality found that Congress had impermissibly vested bankruptcy courts, which do not enjoy Article III attributes, with jurisdiction over common law claims. The concurring opinion, however, was more narrowly drawn; Justice Rehnquist limited his concurrence by noting that the bankruptcy courts at issue in *Northern Pipeline* did not acquire their jurisdiction with litigant consent:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III of the United States Constitution.

Northern Pipeline, 458 U.S. at 91 (emphasis added).

While a single opinion could not command five votes in *Northern Pipeline*, a majority of the justices did agree that the absence of consent to adjudication by bankruptcy judges was fatal to the Bankruptcy Act and integral to the Court's holding. Justices Rehnquist, O'Connor, White and Powell, together with the Chief Justice, authored or concurred in opinions which referred to the absence of consent as a critical flaw in the Bankruptcy Act, 458 U.S. at 91, 92, 95.

As noted above, the *Thomas* decision unambiguously articulated that consent is a critical element in determining the propriety of adjucations by non-Article III courts.

This Court has consistently upheld the consensual reference of disputes to non-Article III tribunals. In *Heckers* v. *Fowler*, 69 U.S. 123 (1865), the Court upheld the consensual assignment of a trial to a referee. In *Kimberly* v. *Arms*, 129 U.S. 512 (1889), the Court held that, upon the consent of the parties, a master could hear a matter and report findings of fact and law to the judge, who was to treat the findings as presumptively correct. The Court has also consistently held that under the 1898 Bankruptcy Act the parties have the right to consent to have all issues, including state common law claims, resolved by a referee. *See Katchen* v. *Landy*, 382

U.S. 323 (1966); *Cline* v. *Kaplan*, 323 U.S. 97, 98-99 (1944); *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-69 (1932). More recently, the Court has held that parties may consent to arbitration to resolve their disputes. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974).

The cases in which the Court has upheld consent to a non-Article III forum have one common feature. In each case Congress has provided the parties with an alternative—not a substitute—to an Article III court. As long as an Article III judge is available to decide the dispute, the Constitution's requirement of separation of powers has been satisfied.

Under the Commodity Exchange Act, a customer may turn to an Article III Court to resolve a dispute;[1] he may also

[1]There is no question that Schor believed that a federal forum was available to him. When Conti filed a federal action to pursue Schor's debit balance, Schor filed a counterclaim asserting his claim under the Commodity Exchange Act.

At the time of the transactions described in Schor's reparations complaint, most federal courts which had considered the question upheld the right of commodity customers to bring private actions for damages under the Act. *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Booth* v. *Peavy Company Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Arnold* v. *Bache & Co.*, 377 F.Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F.Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hamill & Co.*, 341 F.Supp. 764 (E.D. La. 1972); *Anderson* v. *Francis I. DuPont & Co.*, 291 F.Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F.Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

In *Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir. 1973), the court of appeals upheld a private right of action under the Commodity Exchange Act on behalf of traders against a contract market and certain of its member firms. Thereafter, the Supreme Court assumed that the Act provided the plaintiffs with a private cause of action, but reversed on primary jurisdiction grounds, holding that the plaintiffs should be required, before filing suit, to pursue their claim in an administrative forum. *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 115 (1973). The law was so well

(footnote continued on next page)

elect to proceed in arbitration, or in reparations. The Act does not abrogate the Article III remedy; it merely provides a voluntary alternative.

To the extent that the Court of Appeals in the instant case found that the presence of litigant consent does not obviate Article III problems, that decision is in conflict with this Court's holdings in *Northern Pipeline*, *Thomas*, and previous decisions.

Twelve circuit courts of appeals have considered the holding of *Northern Pipeline* in the context of the constitutionality of § 636(c) of the Federal Magistrates Act, 28 U.S.C. § 636(c) (1982). *Bell & Beckwith* v. *United States of America*, 766 F.2d 910 (6th Cir. 1985); *Gairola* v. *Commonwealth of Virginia*, 753 F.2d 1281 (4th Cir. 1985); *D.L. Auld Co.* v. *Chroma Graphics Corp.*, 753 F.2d 1029 (Fed. Cir. 1985); *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985); *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Brothers Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (*en banc*), *cert. denied*, — U.S. —, 105 S.Ct. 906 (1984); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 218 (1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 172 (1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (*en banc*) *cert. denied*, — U.S. —, 105 S.Ct. 100 (1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983).

(footnote continued from preceding page)

settled that the Exchange in *Deaktor* did not even question the existence of a private right of action under the Act in its petition for certiorari. To the contrary, the Exchange supported its primary jurisdiction argument by noting that the "constant threat of harrassing suits" had placed it in "an intolerable position." (Pet. for cert., case no. 73-241, p. 11).

All twelve courts of appeals reached the identical ultimate conclusion that the Federal Magistrates Act does not run afoul of Article III. In arriving upon their judgments, most of the courts focused to some extent on both (1) the element of consent present in the reference of cases to federal magistrates and (2) the degree of control exercised over magistrates by Article III judges. While two of the circuits stressed the control factor (*Collins* and *Pacemaker*, *supra*), four circuits placed primary emphasis on the consent element (*Fields*, *Geras*, *Goldstein*, and *Wharton-Thomas*, *supra*). The relationship between magistrates and the federal judges who appoint and control them is so strong and so obvious that it could hardly be ignored in considering the Magistrates Act. However, two court of appeals held that litigant consent *alone* satisfies an Article III analysis. (*United States* v. *Dobey* and *Bell & Beckwith* v. *United States*, *supra*).

Significantly, the D.C. Circuit itself, in its own Magistrates Act case, placed paramount importance upon the consent issue. In *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 894 (D.C. Cir. 1984), Judge MacKinnon[3] found "virtually dispositive" this Court's decision in *Heckers* v. *Fowler*, 69 U.S. 123 (1865), which upheld the consensual submission of a trial to a referee.

When this Court addressed the issue of the interaction of Article III of the United States Constitution and the power of Congress to establish procedures for the adjudication of rights in *Northern Pipeline*, it took on "an area of constitutional law . . . with . . . frequently arcane distinctions and confusing precedents . . ." *Northern Pipeline*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring). Justice Rehnquist observed that "the cases dealing with the authority of Congress to create courts other than by use of its power under Article III do not admit of easy synthesis." *Id.* But despite this Court's attempts to synthesize those earlier cases and to resolve the confusion, the Court of Appeals, even with the

[3]Judge MacKinnon participated on the panel in the instant case.

guidance of *Northern Pipeline*, was left to conclude that "the jurisprudence on Article III jurisdiction is not, quite regrettably, the clearest of constitutional fields." *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893 (D.C. Cir. 1984). As already noted, *supra* at p. 14, the Court of Appeals, in deciding the instant case, concluded that *Northern Pipeline* and the various decisions then available on the Magistrates Act provided no guidance on the question of whether consent alone obviates Article III problems. Likewise, the Court of Appeals apparently found no guidance in *Thomas*.

While petitioner respectfully believes that *Northern Pipeline* and *Thomas* offer more guidance than was perceived by the Court of Appeals, the instant case presents for the first time the issue of whether consent alone, without the adjunct and control attributes inherent in the federal magistrates system, is sufficient to satisfy the separation of powers doctrine as it regulates the relationship between congressionally created rights and the protections of Article III. If there is confusion on that question, it should be eliminated to remove the uncertainty created by the instant case over whether litigants may safely turn to alternative dispute resolution forums.

II. Even If The Holding Below Were Correct, It Should Only Be Applied Prospectively.

The Court of Appeals did not address the question of whether its decision would be applied retroactively. If the Court of Appeals was correct that the Commission has no jurisdiction over common law counterclaims, all awards entered on such claims since the inception of the reparations program are subject to attack.

This Court has repeatedly recognized ". . . the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time." *Heckler* v. *Mathews*, 465

U.S. 728, 746, 104 S.Ct. 1387, 1398 (1984); *Northern Pipeline* at 87-89.

All of the litigants who submitted their disputes to reparations reasonably relied upon the legitimacy of the Commission's jurisdiction. Certainly, Conti relied upon that jurisdiction when it voluntarily dismissed its lawsuit in federal district court in 1981 to proceed in reparations. It would be a miscarriage of justice for Conti and innumerable other litigants to have their cases unraveled by a retroactive application of this decision.

CONCLUSION

Petitioner respectfully suggests that this Court's holdings in *Northern Pipeline* and *Thomas* have settled the proposition that litigant consent obviates Article III concerns over congressionally created alternative dispute resolution forums. If *Northern Pipeline* did not settle the question, however, this Court should resolve once and for all this vital question of federal law by vacating the judgment below.

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DATE: January 23, 1986

Nos. 85-621 and 85-642

In the Supreme Court of the United States

OCTOBER TERM, 1985

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

CONTICOMMODITY SERVICES, INC., PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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QUESTION PRESENTED

Whether the Commodity Futures Trading Commission, which adjudicates, subject to judicial review, claims for money damages brought against commodities brokers by customers alleging a violation of the Commodity Exchange Act, is precluded by Article III of the Constitution from entertaining the broker's state law counterclaim arising out of the same transaction or occurrence, when the customer could have brought his claim in an Article III court in the first instance but chose to proceed before the CFTC instead.

PARTIES TO THE PROCEEDING

The Commodity Futures Trading Commission adjudicated the claims of the parties in the administrative proceeding and was a respondent in the court of appeals. ContiCommodity Services, Inc. and Richard L. Sandor were respondents in the administrative proceeding and in the court of appeals. William T. Schor and Mortgage Services of America were complainants in the administrative proceeding and petitioners in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-7a)[1] is reported at 770 F.2d 211. The initial opinion of the court of appeals (Pet. App. 8a-49a) is reported at 740 F.2d 1262. The order of the

[1] "Pet. App." refers to the appendix to the petition in No. 85-621.

court of appeals denying the suggestion for rehearing en banc following the court of appeals' initial decision (Pet. App. 69a-70a) and the statement of two judges of the court of appeals dissenting from the denial of rehearing en banc (Pet. App. 71a-73a) are unofficially reported at 2 Comm. Fut. L. Rep. (CCH) ¶ 22,409. The decision of the Administrative Law Judge (Pet. App. 53a-63a) is unreported. The order of the Commission denying review of that decision (Pet. App. 50a-52a) is unofficially reported at [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,823.

JURISDICTION

The judgment of the court of appeals (Pet. App. 64a-66a) was entered on August 13, 1985. The petition for a writ of certiorari in No. 85-621 was filed on October 11, 1985. The petition for a writ of certiorari in No. 85-642 was filed on October 16, 1985. The petitions were granted and the cases consolidated on December 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article III of the Constitution; Section 14 of the Commodity Exchange Act, 7 U.S.C. (& Supp. V 1981) 18; the current version of Section 14, 7 U.S.C. 18; Section 6(b) of the Act, 7 U.S.C. (1976 ed.) 9; the current version of Section 6(b), 7 U.S.C. 9; and 17 C.F.R. 12.23(b)(2) (1983), now codified at 17 C.F.R. 12.19, are set forth at Pet. App. 74a-91a. 17 C.F.R. 12.24 and 12.26(a) (1980) are set forth at J.A. 41-42.

STATEMENT

1. The Commodity Exchange Act (CEA), 7 U.S.C. (& Supp. II) 1 *et seq.*, is " 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran* (*Merrill Lynch*), 456 U.S. 353, 356 (1982) (footnote omitted). The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. 7 U.S.C. 6b, 13(b); see *Merrill Lynch*, 456 U.S. at 365-366. In 1974, Congress amended the CEA to "broaden[] its coverage," to "increase[] the penalties for violation of its provisions," and to create the Commodity Futures Trading Commission (CFTC), which has broad powers to enforce the CEA. *Id.* at 365 (footnote omitted); see, *e.g.*, 7 U.S.C. 13a, 13a-1, 13b.

At the same time that it created the Commission, Congress directed it to establish a "reparations" procedure for the adjudication of disputes between commodity brokers and their customers. Congress intended the reparations procedure to provide an inexpensive and expeditious remedy "analogous to * * * a small claims court." S. Rep. 95-850, 95th Cong., 2d Sess. 11, 16 (1978). Specifically, Section 14 of the CEA, 7 U.S.C. (& Supp. V 1981) 18,[2] provides that any person injured by a violation of the CEA or of CFTC regulations may apply to the Commission for an order directing the offender to pay reparations to the complainant. See 7 U.S.C. (Supp. V 1981) 18(a); 7 U.S.C. (1976 ed.) 18(e). The parties are afforded

[2] Section 14 was amended in 1983 (see Pet. App. 9a n.1), but those amendments are only indirectly material to this litigation. See pages 20-21, *infra*.

a hearing before an administrative law judge, whose decision is subject to review by the Commission. 7 U.S.C. (Supp. V 1981) 18(b) and (c). Final Commission orders are reviewable in the appropriate court of appeals. 7 U.S.C. 18(e).

The first regulations implementing the reparations procedure—regulations issued by the Commission when Section 14 became effective—provided that a party against whom a reparations complaint was brought may file a counterclaim "if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3994, 4002 (1976); 17 C.F.R. 12.23(b)(2) (1976), now codified at 17 C.F.R. 12.19. This is a permissive counterclaim rule; it leaves a party free to proceed on his counterclaim in court, instead of before the CFTC, if he so chooses.

2. a. In February 1980, respondents Schor and Mortgage Services of America invoked the Commission's reparations jurisdiction by filing a complaint against ContiCommodity Services, Inc. and Richard L. Sandor, a Conti employee.[3] Conti was a commodity futures broker; Schor had an account with Conti and used the account to buy and sell commodity futures. Conti and Schor agreed that Schor's account

[3] Two complaints, relating to separate trading accounts, were filed on behalf of Schor and the mortgage banking company, Mortgage Services of America, of which Schor was president and 90% shareholder. The complaints contained virtually identical allegations and were consolidated at the administrative level. The court of appeals also consolidated the two separate petitions for review of the Commission's final reparation order filed by Schor and Mortgage Services of America. We refer to Schor and Mortgage Services of America jointly as "Schor," and to Conti and Sandor jointly as "Conti."

contained a "debit balance" (Pet. App. 63a)—that is, net trading losses and expenses (such as commissions) exceeded the deposits made in the account by Schor. But Schor asserted that the debit balance was the result of Conti's violations of the CEA. In particular, Schor alleged that Conti had failed to execute market orders that Schor had attempted to place, thus committing fraud prohibited by the CEA. Conti denied the allegations and filed a counterclaim seeking to recover the debit balance from Schor. Conti's counterclaim asserted that the debit balance resulted from Schor's trading and was therefore a simple debt owed by Schor. Pet. App. 11a-13a, 53a; J.A. 29-30, 31-32.

Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action in federal district court to recover the debit balance. *Conti-Commodity Services, Inc.* v. *Mortgage Services of America, Inc.*, No. 80 C 1089 (N.D. Ill.). Schor filed a counterclaim in that action, alleging that Conti had violated the CEA. Schor also moved on two separate occasions to dismiss or stay the district court action because "[t]he reparations proceedings * * * will fully and completely resolve and adjudicate all of the rights of the parties to this action with respect to the transactions which are the subject matter of this action." J.A. 13; see also J.A. 19. In support of his motions, Schor further stated that "[t]he continuation of th[e] [court] action * * * would be unjust to [Schor] in that it would require [him], at a great cost and expense, to litigate the same issues in two forums." J.A. 13; see also J.A. 19. Although the district court declined to stay or dismiss the suit (J.A. 15, 16), Conti voluntarily dismissed the federal court action and pre-

sented its debit balance claim as a counterclaim in the Commission's reparations proceeding. See J.A. 29-30, 31-32.

b. The administrative law judge, after conducting an evidentiary hearing, preliminarily ruled in Conti's favor on both the claim and the counterclaim. After this ruling, Schor for the first time challenged the Commission's statutory authority to adjudicate Conti's counterclaim. The ALJ then issued his decision, holding that Schor had failed to establish that Conti had violated the Act and awarding Conti the debit balance in the account. Pet. App. 53a-63a. The Commission denied Schor's application for review of the ALJ's decision. *Id.* at 50a-52a.

3. On June 28, 1983, Schor filed a petition for review of the Commission's order in the court of appeals. A few days before oral argument, the court of appeals, sua sponte, raised the question whether *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)—in which this Court declared unconstitutional, under Article III, the adjudication of certain claims by the bankruptcy courts established by the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.* (see 28 U.S.C. (Supp. II 1978) 1471)—was relevant to the Commission's adjudication of Conti's counterclaims.

After briefing and argument on this issue, the court of appeals upheld most aspects of the Commission's ruling on Schor's claim (Pet. App. 14a-18a)[4] but ordered the dismissal of Conti's counterclaims on the ground that "the CFTC lacks authority (subject matter competence) to adjudicate" common law counter-

[4] In one respect, the court of appeals vacated the Commission's rejection of Schor's claim and remanded for further proceedings. Pet. App. 18a. That aspect of the court of appeals' decision is not at issue here.

claims. *Id.* at 10a. The court of appeals acknowledged the similarities between the CFTC's adjudicatory scheme and the form of administrative agency adjudication upheld in *Crowell* v. *Benson*, 285 U.S. 22 (1932). Pet. App. 33a n.24. The court of appeals stated, however, that this Court's "latest Article III pronouncement—*Northern Pipeline*, *supra*—* * * generates doubt concerning the constitutionality of [the] Commission['s adjudication of counterclaims] sufficient to impel us to interpret the CEA as withholding from the Commission jurisdiction * * * over common law counterclaims." Pet. App. 23a.

a. The court of appeals first analyzed the CFTC's counterclaim jurisdiction according to the framework established in the plurality opinion in *Northern Pipeline*. The court ruled that CFTC adjudication of counterclaims "does not fit within" either "the Article III exception carved long ago for 'legislative courts' " or "the Article III court 'adjunct' accommodation." Pet. App. 24a (footnote omitted). Specifically, the court reasoned that the Commission's power to adjudicate counterclaims like Conti's cannot rest on the ground that the Commission functions as a " 'legislative court' " that may, consistently with Article III, adjudicate " 'public rights' cases" (*ibid.*) because the government is not a party to the counterclaim, which "involve[s] 'adjudication of state-created private rights' " (*id.* at 26a (citation omitted)). And the court of appeals concluded that the Commission does not function as an "adjunct" of an Article III court because Article III courts are not free to reconsider the CFTC's factual findings de novo and Article III judges do not control the appointment or removal of Commissioners or the reference of claims to the Commission. *Id.* at 28a-32a.

The court of appeals then turned to, and rejected, the Commission's contention that Schor had effectively consented to CFTC adjudication of Conti's counterclaim against him. The Commission had pointed out that Schor had an implied right of action under the CEA (see *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran, supra*)[5] and therefore could have brought his claim against Conti in federal district court; the Commission contended that when Schor chose to bring his claim in the CFTC reparations proceeding instead, with full knowledge that the Commission would allow Conti to bring a counterclaim arising out of the same transaction, Schor consented to CFTC adjudication of such a counterclaim.[6] The court of appeals questioned whether consent could establish the constitutionality of CFTC adjudication of Conti's counterclaim (see Pet. App. 39a-40a), but it rejected the Commission's argument principally on the ground that "Schor has [not] manifested * * * unburdened assent to CFTC jurisdiction over Conti's counterclaims." *Id.* at 37a. The court of appeals reasoned as follows:

> [C]omplainants positioned as Schor [are faced] with this choice: File a reparations complaint with the Commission and "consent" to relinquish the right to have an Article III tribunal adjudicate the broker's related common law claims; or forgo the congressionally-established right to a Commission determination of a reparations com-

[5] In 1983, Congress amended the CEA to provide expressly for private rights of action. See 7 U.S.C. 25.

[6] Indeed, Schor consistently sought dismissal of the suit by Conti for the debit balance in federal district court because the reparations proceedings would fully resolve all of the issues presented. See page 5, *supra*.

> plaint * * *. This is hardly * * * cost-free consent * * *.

Id. at 38a-39a (footnote omitted).

b. Having concluded that "[s]erious constitutional problems thus attend CFTC adjudication of common law counterclaims[,]" the court of appeals stated that the CEA did not manifest a "firm [congressional] intention regarding CFTC jurisdiction over common law counterclaims" and ruled that it would "adopt the construction of the Act that avoids significant constitutional questions." Pet. App. 40a-41a. In determining that the CEA did not clearly authorize the CFTC to adjudicate counterclaims like Conti's, the court refused to defer to the CFTC's interpretation of the Act on the ground that the question whether the CEA authorizes adjudication of counterclaims by the CFTC is a "statutory interpretation-jurisdictional question * * * [of] precisely the kind with which courts customarily deal," not a "'matter[] within the agency's expertise.'" *Id.* at 45a (citation omitted).[7]

The court below recognized that at the time Schor brought his reparations claim, the text of the CEA explicitly referred to counterclaims (7 U.S.C. (1976 ed.) 18(d)) and contemplated that the CFTC might award reparations against the complainant (7 U.S.C. (1976 ed.) 18(f) and (g)), but the court stated that

[7] The court also noted that the Commission had once issued a *proposed* regulation that permitted only a narrower class of counterclaims to be brought in the reparations forum; even though that regulation was never adopted, the court of appeals concluded on this basis that "[t]he CFTC has not maintained a consistent position on the scope of its authority to adjudicate counterclaims." Pet. App. 43a-44a.

"Congress might have contemplated counterclaims only * * * of a narrow compass." Pet. App. 42a.[8] Finally, the court of appeals acknowledged (*id.* at 47a) that the House report accompanying the 1974 amendments to the CEA—the amendments that established the reparations procedure—explicitly stated that "[c]ounterclaims will be recognized in [reparations] proceedings * * * on such terms and under such circumstances as the Commission may prescribe by regulation" (H.R. Rep. 93-975, 93d Cong., 2d Sess. 23 (1974)); but the court dismissed this statement as a "fragment[] of legislative history" that could not manifest congressional intent because "it would be extraordinary for a legislature to deliver such a blank check to an administrative tribunal" (Pet. App. 46a-47a).

4. The court of appeals denied rehearing en banc by a divided vote. Pet. App. 69a-73a. In a dissenting statement, Judge Wald, joined by Judge Starr, urged that rehearing be granted because the panel's holding would "result[] in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act * * * violations" and would "decimate[]" this "faster and less expensive alternative forum." *Id.* at 71a. Judge Wald determined that "there is no doubt" that "Congress *expressly* meant to convey * * * jurisdiction" over counterclaims like Conti's to the Commission, and that "[t]o suggest otherwise is to blink reality." *Ibid.* (emphasis in original). Judge Wald also indicated that she considered the Commission's consent argument to be substantial, noting that "[p]etitioners to

[8] Specifically, the court of appeals suggested that the CFTC has authority to resolve only counterclaims based on the CEA itself. See, *e.g.*, Pet. App. 42a-43a.

the CFTC forum, like Schor[], plainly take notice of the counterclaim risk. Moreover, CFTC petitioners presently enjoy a private right of action under the [CEA] in federal courts." *Id.* at 72a. Judge Wald concluded as follows:

> In sum, this is, so far as I know, the first major extension of [*Northern Pipeline*] to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas.

Id. at 72a-73a.

5. Following the denial of rehearing, the Solicitor General, on behalf of the Commission, filed a petition for a writ of certiorari (No. 84-1519). On July 2, 1985, the Court granted the petition, vacated the court of appeals' judgment, and remanded the case for further consideration in light of *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), in which the Court held that the arbitration scheme established under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. (& Supp. II) 136 *et seq.*, does not contravene Article III.[9]

[9] The Court denied Schor's cross-petition for a writ of certiorari (No. 84-1673) on June 17, 1985. Following the decision of the court of appeals on remand, Schor filed a second cross-petition (No. 85-872), substantially identical to the first, which the Court denied on January 21, 1986.

6. On remand, the court of appeals reinstated its prior judgment. Pet. App. 1a-7a. The court distinguished *Thomas* on two grounds. First, the court concluded that *Thomas* had no application because that case "arose entirely within the confines of federal law," while here the counterclaim arose under state law. Pet. App. 4a. Second, the court found that Congress spoke more explicitly in FIFRA than it did in establishing the CFTC's jurisdiction in the CEA. *Ibid.* The court reaffirmed its earlier view that *Northern Pipeline* controls this case and mandates invalidation of the Commission's authority to decide debit balance counterclaims in reparations proceedings. Pet. App. 5a n.9, 6a-7a & n.15.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and that the judges of these courts shall serve "during good Behaviour," with compensation that "shall not be diminished" during their tenure. These provisions are intended to "protect the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts." *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 13; see, *e.g.*, *O'Donoghue* v. *United States*, 289 U.S. 516, 530-534 (1933).

In light, however, of the broad powers the Constitution elsewhere confers upon Congress, "[a]n absolute construction of Article III is not possible." *Thomas*, slip op. 13. Rather, as this Court has recognized for more than 150 years, Congress has substantial flexi-

bility to assign adjudicative tasks to "legislative courts" and other administrative tribunals created pursuant to its powers under Article I. See, *e.g.*, *Thomas*, slip op. 13; *Palmore* v. *United States*, 411 U.S. 389, 408 (1973); *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 594-596 (1949) (plurality opinion); *id.* at 641-644 (Vinson, C.J., dissenting); *Crowell* v. *Benson*, 285 U.S. 22 (1932); *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 396 (2d ed. 1973); cf. *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442 (1977). The capacity of the parties to a dispute to consent to a federally enforceable adjudication before a decisionmaker lacking the salary and tenure protections of Article III is equally well-established. See, *e.g.*, *Ex parte Peterson*, 253 U.S. 300, 314 (1920); *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U.S. 489, 494-495 (1912); *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 131 (1864); *Field* v. *Holland*, 10 U.S. (6 Cranch) 8, 20-21 (1810); see also 9 U.S.C. 1 *et seq.* (Federal Arbitration Act).

The question presented in this case is whether Article III prohibits the Commodity Futures Trading Commission from adjudicating, on the basis of the parties' consent and subject to judicial review, a counterclaim arising out of the same transaction that forms the basis for a complaint for reparations under the Commodity Exchange Act. We submit that such adjudication is fully consistent with this Court's precedents and does not impinge on any value underlying Article III. The consent of the parties surely satisfies the constitutional concern for fair and im-

partial adjudication. And the availability of an initial administrative forum in these circumstances plainly does not threaten the independence of the federal judiciary: the option to proceed before the CFTC in a dispute such as this one neither interferes with the judiciary's consideration of cases before it nor prevents the judiciary from performing its constitutionally assigned function as the ultimate arbiter of federal law.

The court of appeals relied almost exclusively on the plurality opinion in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the only case in which this Court has ever invalidated on Article III grounds Congress's establishment of a non-Article III federal adjudicative tribunal. In the court of appeals' view, *Northern Pipeline* prohibits the adjudication by an Article I decisionmaker of causes of action, such as the counterclaim at issue in this case, that arise under state law. This conclusion, however, ignores the nonconsensual nature of the adjudication in *Northern Pipeline*, a factor whose central importance was recognized in each of the opinions in that case and subsequently by the Court in *Thomas*. See *Northern Pipeline*, 458 U.S. at 80 n.31 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment); *id.* at 92 (Burger, C.J., dissenting); *id.* at 95 (White, J., dissenting); *Thomas*, slip op. 14. It also disregards the extremely close factual and legal relationship between Schor's reparations claim and Conti's counterclaim and the limited and specialized nature of the CFTC's reparations jurisdiction.

In *Thomas*, this Court recently admonished that "practical attention to substance rather than doctrinaire reliance on formal categories should inform

application of Article III." Slip op. 17. Under that approach, the constitutionality of the administrative adjudication of what in federal court would be a compulsory counterclaim is, we think, unassailable. Any other result would prevent the administrative tribunal from " 'decid[ing] all matters in dispute and decree[ing] complete relief,' " and would effectively "dismember a scheme which Congress has prescribed." *Katchen* v. *Landy*, 382 U.S. 323, 335, 339 (1966). There is no warrant in Article III for mandating that parties may not consent to the CFTC's adjudication, subject to judicial review, of a counterclaim such as Conti's as an incident to the Commission's decision, the constitutionality of which is undoubted, on a reparations claim brought under the CEA.

* * * * *

A. Before confronting the Article III issues presented in this case, it is necessary to address the court of appeals' conclusion that Congress did not authorize the Commission to entertain counterclaims that, like Conti's, arise out of the same transaction as an underlying reparations complaint. That conclusion is plainly wrong. The Commission's rule permitting such counterclaims is authorized by the agency's sweeping rulemaking authority, which empowers it to promulgate rules that are, in the CFTC's judgment, reasonably necessary to accomplish any purpose of the Commodity Exchange Act. Moreover, the legislative history of the Act clearly shows that the rule established by the Commission fully comports with Congress's intent.

B. The practical result of invalidating the Commission's counterclaim rule would be that the "faster and less expensive alternative forum" established by Congress "will be decimated." Pet. App. 71a (Wald,

J., dissenting from denial of rehearing en banc). Because of the incentives facing parties to avoid piecemeal litigation, they would be deterred from proceeding in a forum that, because of the absence of jurisdiction over counterclaims, could not resolve their entire dispute. It is the Commission's judgment that reparations complainants, if faced with the prospect of defending against a counterclaim in federal court in any event, would choose to forgo altogether bringing their actions before the administrative tribunal and would simply proceed at once to court. This would not only deprive the parties of the advantages of a more convenient and expeditious forum, it would also deprive the Commission of a significant tool for interpreting the law and policing the industry.

C. In our view, Schor's voluntary and knowing consent to the Commission's adjudication of Conti's counterclaim conclusively answers any Article III objection to the procedure. Schor plainly gave effective consent by electing to bring his complaint before the Commission rather than in court, with full knowledge that Conti would be able to raise its counterclaim in the same forum. Indeed, Schor repeatedly sought dismissal of Conti's federal court action to recover the debit balance on the ground that he preferred to have the entire controversy resolved by the CFTC.

A fundamental purpose of Article III is to ensure the litigants' right to an impartial decisionmaker. Like any other right intended to protect the parties, it is subject to waiver by them. This Court, accordingly, has long held that parties may waive their right to an Article III decisionmaker by consenting to a hearing before a referee or arbitrator whose decision is enforceable in federal court. Similarly, the

courts of appeals have uniformly upheld the constitutionality of the Magistrates Act, which permits the parties to consent to trial before a magistrate who does not enjoy the salary and tenure protections of Article III. No institutional concern underlying Article III is jeopardized by the CFTC's adjudication of state law counterclaims: such adjudication does not threaten the independence of Article III judges, nor does it undermine the judiciary's role as the ultimate expositor of federal law. In sum, there is no reason to find that Schor's consent is constitutionally ineffective.

D. The Commission's reparations forum possesses characteristics definitively establishing its constitutionality wholly apart from the parties' consent. Counterclaims such as Conti's arise out of the same transaction that forms the basis for the reparations complaint; in federal court, these would be compulsory counterclaims under Fed. R. Civ. P. 13(a) within the court's ancillary jurisdiction even in the absence of an independent jurisdictional basis. Such a rule is necessary in order to provide complete relief between the parties and to avoid deterring them from utilizing the forum altogether because such relief is not possible. The same concerns support the Commission's counterclaim rule. Once a case is properly in the administrative forum, no Article III value could possibly be impinged by allowing the tribunal to entertain factually intertwined counterclaims such as the one at issue here.

In addition, the Commission's adjudication of counterclaims is functionally identical to the administrative adjudicatory scheme upheld by the Court in *Crowell* v. *Benson*, 285 U.S. 22 (1932), and it is supported as well by the pragmatic concerns that, as

this Court recently emphasized, must be the focus of inquiry under Article III. *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985). The reparations procedure resolves only claims arising in a narrow and highly specialized financial area. Moreover, the Commission's decision on a debit balance counterclaim such as Conti's necessarily depends on its resolution of the federal law issue presented by the reparations complainant. Finally, the Commission's counterclaim rule is fully consistent with the plurality opinion, as well as the other opinions, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

ARGUMENT

WHEN A CUSTOMER CHOOSES TO BRING A REPARATIONS COMPLAINT AGAINST A BROKER BEFORE THE COMMODITY FUTURES TRADING COMMISSION, THE COMMISSION'S ADJUDICATION, SUBJECT TO JUDICIAL REVIEW, OF THE BROKER'S COUNTERCLAIM ARISING OUT OF THE SAME TRANSACTION GIVING RISE TO THE COMPLAINT IS CONSISTENT WITH ARTICLE III

A. The Commodity Exchange Act Authorizes the Commission To Entertain A Counterclaim That Arises Out Of The Same Transaction That Forms The Basis For The Underlying Reparations Complaint

1. The court of appeals' holding that Congress did not authorize the Commission to entertain counterclaims like Conti's is, in our view, transparently erroneous. Congress conferred "broad rule-making powers" on the CFTC. *Rice* v. *Board of Trade*, 331 U.S. 247, 252 (1947). Indeed, Congress's grant of authority to the Commission is phrased in particularly sweeping terms; the Commission is authorized

"to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions *or to accomplish any of the purposes of* [the CEA]." 7 U.S.C. (1976 ed.) 12a(5) (emphasis added). See also H.R. Rep. 93-975, 93d Cong., 2d Sess. 22 (1974) (noting that the CFTC is "expect[ed] * * * to publish regulations" implementing the reparations procedure). Since, as we explain below (pages 24-27), excluding counterclaims that arise from the same transaction would undermine the entire reparations procedure, there can be no doubt that the Commission acted within its authority when it issued a regulation permitting such counterclaims to be brought in reparations proceedings.

The Commission's counterclaim rule is, in any event, supported by more than the breadth of its rule-making power and the reasonableness of its rule. The legislative history of the CEA makes clear that when Congress established the reparations procedure, it intended to grant the CFTC not just broad regulatory powers in general but, specifically, broad authority to issue a regulation authorizing counterclaims. The House report on the legislation that established the reparations procedure explicitly stated that the Commission is to exercise such authority:

> Counterclaims will be recognized in [reparations] proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

H.R. Rep. 93-975, *supra*, at 23. Moreover, the text of Section 14, which established the reparations forum, refers on numerous occasions to "the complainant" or

the "person complaining" (*e.g.*, 7 U.S.C. (Supp. V 1981) 18(a); 7 U.S.C. (1976 ed.) 18(d) and (e)) and to "the respondent" (*e.g.*, 7 U.S.C. (Supp. V 1981) 18(a), (b) and (c); 7 U.S.C. (1976 ed.) 18(d) and (e)). It carefully specifies, however, that enforcement of an order awarding reparations may be sought by "the complainant, *or any person for whose benefit such order was made*" (7 U.S.C. (1976 ed.) 18(f) (emphasis added)) and that review of a reparations order may be sought by "*any party* aggrieved thereby" (7 U.S.C. (1976 ed.) 18(g) (emphasis added)). The most likely explanation of the review provision, and the only possible explanation of the enforcement provision, is that Congress envisioned that counterclaims would be permitted in reparations proceedings. Further, Section 14 requires nonresident complainants to post a bond to secure not just "the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail," but also the payment of "any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent." 7 U.S.C. (1976 ed.) 18(d) (emphasis added).

Moreover, when Congress amended Section 14 in 1978, see Futures Trading Act of 1978, Pub. L. No. 95-405, § 21, 92 Stat. 875, it expressed no disagreement with the CFTC regulation—which, as we noted, was issued at the same time that the reparations procedure took effect—that asserted jurisdiction over all counterclaims arising out of the same transactions as the reparations claim. In 1983, Congress again amended Section 14 specifically to "provide that the trading privileges of a *customer against whom an award was rendered on a* [*broker's*] *counterclaim* could be terminated if payment of the award was not

timely made." H.R. Rep. 97-565, 97th Cong., 2d Sess. Pt. 1, at 106 (1982) (emphasis added). The legislative deliberations preceding the 1983 amendments to the Act reveal that it was universally understood that "the reparations program seeks to pass upon the whole controversy surrounding each claim, *including counter-claims arising out of the same set of facts.*" *Id.* at 55 (emphasis added).[10] These amendments explicitly authorized the CFTC to promulgate rules that "may prescribe, * * * without limitation * * * [,] the nature and scope of * * * counterclaims." 7 U.S.C. 18(b).

2. The court of appeals responded to this abundant evidence of congressional intent to permit the CFTC to regulate its own counterclaim jurisdiction by suggesting that Congress might have intended to allow the Commission to permit only a narrower class of counterclaims, such as counterclaims arising under the CEA itself. See, *e.g.*, Pet. App. 42a, 43a.[11] This

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[10] Accord, S. Rep. 97-384, 97th Cong., 2d Sess. 49 (1982); 128 Cong. Rec. S13077 (daily ed. Oct. 1, 1982) (statement of Sen. Helms); *Commodity Futures Trading Commission Reauthorization: Hearings on S. 2109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 97th Cong., 2d Sess. 302 (1982) (statement of Philip McB. Johnson, Chairman, CFTC); *CFTC Reauthorization: Hearings on H.R. 5447 Before the Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture*, 97th Cong., 2d Sess. 117 (1982) (statement of Philip McB. Johnson).

[11] The court of appeals also stated that the CFTC's interpretation of the statute it is charged with administering is not entitled to deference because the Commission "has not maintained a consistent position on the scope of its authority to adjudicate counterclaims." Pet. App. 43a-44a. As we have noted, however (page 4, *supra*), the CFTC issued the counterclaim rule currently in force at the time that the repara-

is no more than unsubstantiated speculation on the part of the court of appeals; the court cited no evidence whatever that Congress intended to limit the

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tions program first took effect; the rule has been the same throughout. The only "inconsistency" identified by the court of appeals was a *proposed* rule, published by the Commission for notice and comment, that would have allowed a much narrower class of counterclaims. 40 Fed. Reg. 55666, 55667, 55672-55673 (1975). But a proposed regulation, of course, does not represent an agency's considered interpretation of its statute; an agency is entitled to consider alternative interpretations before settling on the view it considers most sound without relinquishing the deference that Congress intended it to be accorded. It would obviously be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553, to tax an agency with "inconsistency" whenever it circulates a proposal that it has not firmly decided to put into effect and that it subsequently modifies in response to public comment. In fact, the Commission noted that it would "particularly appreciate comments" on the scope of counterclaims that should be permitted in reparations proceedings. 40 Fed. Reg. at 55667. And while the Commission noted in its proposed rulemaking that there was a "substantial question" (*ibid.*) whether a broader counterclaim rule was authorized under the CEA, it certainly did not take the position that the Act definitely barred it from adopting the counterclaim rule that it ultimately promulgated. For all these reasons, there is no justification for the court of appeals' assertion that the CFTC has taken inconsistent positions on this question.

The court of appeals also asserted that whether the CFTC can entertain counterclaims like Conti's is a "statutory interpretation-jurisdictional question" on which the courts, not the agency, are expert. Pet. App. 45a. It is unclear what the court of appeals meant by this statement. Courts are, of course, required to defer to agencies on questions of "statutory interpretation" when the statute is one that the agency is charged with administering. See, *e.g.*, *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9. And issues concerning the nature of the counterclaim rule that would best serve the purposes of the reparations scheme are obviously questions on which the CFTC, not the courts, has superior expertise. See also *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822, 830 n.7 (1984) (quotation marks omitted) (there is no "exception * * * to the normal standard of review of [NLRB] interpretations of the [National Labor Relations] Act" for "jurisdictional or legal question[s] concerning the coverage of the Act").

CFTC's authority in this way. The Commission was given broad powers to effectuate the provisions and purposes of the CEA; there are unmistakable indications that Congress expected the CFTC to issue a regulation permitting counterclaims in reparations cases; nothing in the text or the legislative history of the CEA suggests that Congress intended to limit the CFTC's power to issue a regulation authorizing counterclaims; and the court of appeals did not question that the counterclaim regulation issued by the CFTC is reasonably necessary to accomplish the purposes of the reparations scheme established by Congress.

Moreover, the court of appeals' speculation that the CFTC's counterclaim jurisdiction might extend only to counterclaims alleging violations of the CEA ignores the fact that such claims virtually never arise. As the Commission advised the court of appeals in its rehearing petition, only one such counterclaim was ever brought in a reparations action—and it did not state a cognizable claim under the CEA. For the most part, the prohibitions of the CEA that might give rise to claims for damages simply do not apply to customers. For all these reasons, there is simply no basis for the court of appeals' decision to attribute to Congress a desire to preclude the regulation that

the Commission issued.[12] "The canon favoring constructions of statutes to avoid constitutional questions does not * * * license a court to usurp the policy-making and legislative functions of duly elected representatives" or of the expert agencies the legislature has created to help carry out its will. *Heckler* v. *Mathews*, 465 U.S. 728, 741 (1984).

B. The Commission's Adjudication Of Counterclaims In These Circumstances Is Necessary To Achieve The Purposes Of The Reparations Program

1. The reparations program was created by Congress in order to provide an inexpensive and expeditious alternative to court litigation. S. Rep. 95-850, 95th Cong., 2d Sess. 11, 16 (1978). Since its inception in 1975, the program has disposed of more than 8,000 claims that might otherwise have been adjudicated in the federal courts.[13] Barring the Commission from adjudicating counterclaims such as Conti's would require the parties either to litigate the same disputed issues in two different forums or else to forgo recourse to the administrative tribunal altogether. Judge Wald therefore correctly concluded that the result reached by the court of appeals would "serious[ly] eviscerat[e]" the entire reparations program. Pet. App. 71a.

The controversy between Schor and Conti is typical of the disputes that give rise to a reparations claim.

[12] The court of appeals offered no new support for its statutory analysis in its opinion on remand.

[13] See 1984 CFTC Ann. Rep. 113; 1983 CFTC Ann. Rep. 27; 1982 CFTC Ann. Rep. 33; 1981 CFTC Ann. Rep. 40; 1980 CFTC Ann. Rep. 27; 1979 CFTC Ann. Rep. 30; 1978 CFTC Ann. Rep. 109; 1977 CFTC Ann. Rep. 71; 1976 CFTC Ann. Rep. 87.

Routinely, in CFTC reparations proceedings, a customer and a commodity broker agree that the customer's account contains a debit balance. The customer brings a reparations claim, asserting that the broker created the debit balance by violating the CEA; frequently, the broker counterclaims, asserting that the customer simply owes it the debit balance. In such cases, as the Commission explained in a decision in which it affirmed its authority to resolve counterclaims, the counterclaim "arises out of precisely the same course of events" as the principal claim and requires resolution of many of the same disputed factual issues. *Friedman* v. *Dean Witter & Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307, at 25,538 (Nov. 13, 1981).

Under the Commission's regulation, such a dispute may be resolved, in its entirety, in the administrative forum.[14] Under the court of appeals' approach, the counterclaim may be adjudicated only in a federal or state court. Although invalidation of the Commission's counterclaim rule would theoretically still permit the customer's claim to be adjudicated by the CFTC, a number of considerations support the Commission's conclusion that the practical result of such an approach would be to force the entire dispute into court. See Pet. App. 71a (Wald, J., dissenting from denial of rehearing en banc) (emphasis in original) ("To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense * * * and

[14] We note that the new Bankruptcy Act also permits the resolution of counterclaims by the bankruptcy judge in connection with his decision on claims against the estate. See 28 U.S.C. 157(b)(2)(C).

will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims."); cf. *Katchen* v. *Landy*, 382 U.S. 323, 339 (1966).

In the first place, once a broker is required to proceed against his customer in court rather than before the Commission, the customer often will be forced by a compulsory counterclaim rule such as Fed. R. Civ. P. 13(a) to file his claim against the broker in the same court.[15] Morever, even if a compulsory counterclaim rule does not apply, the customer—who is often an individual proceeding pro se[16]—is unlikely to be willing to bear the expense and inconvenience of litigating the same factual issue in two different forums. As Schor himself noted in arguing for dismissal of Conti's action in federal court, "continuation of th[e] [court] action. * * * would be unjust to [Schor] in that it would require [him], at a great cost and expense, to litigate the same issues in two forums." J.A. 13. Finally, it is the Commission's judgment that if its counterclaim rule is invalidated, potential reparations claimants—knowing that a counterclaim will force them into court in any event—will often forgo bringing their reparations claims before the Commission in the first place and

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[15] The Commission ordinarily will not proceed on a reparations complaint against a broker if the broker's claim against the customer for the debit balance is pending in a court that has a compulsory counterclaim rule. See *Misasi* v. *Paine, Webber, Jackson & Curtis, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,351, at 25,663 (Dec. 30, 1981).

[16] The Commission's experience is that more than 50% of reparations complainants proceed pro se. See generally *Rosenthal & Co.* v. *CFTC*, 614 F.2d 1121, 1123 (7th Cir. 1980).

will proceed instead directly to court. Cf. *Crowell* v. *Benson*, 285 U.S. 22, 94 (1932) (Brandeis, J., dissenting).

In short, the parties (and the tribunals as well) have a significant interest in resolving the entire dispute in one forum. Precluding the CFTC from adjudicating counterclaims will therefore in many instances be tantamount to barring the Commission from playing any role whatever in resolving the dispute. Such a result not only would seriously undermine the congressionally created administrative dispute resolution forum, it would also deprive the Commission of an important opportunity for developing a consistent course of administrative interpretation of the governing law and of a significant tool for policing the commodities industry: for example, reparations complaints are reviewed for possible investigation and law enforcement action by the Commission's Division of Enforcement. See 7 U.S.C. 15; see also *Myron* v. *Hauser*, 673 F.2d 994, 1005 (8th Cir. 1982) ("[I]n a functional sense * * * [the reparations proceeding is] between the government and the commodity * * * broker, the party subject to government regulation."); *Bowley* v. *Stotler & Co.*, 751 F.2d 641, 644-646 (3d Cir. 1985) (relying on interpretation of the law developed by CFTC in reparations proceedings).

2. In addition to its effect on the CFTC's reparations program, invalidation of the Commission's counterclaim rule might cast doubt on administrative adjudicatory schemes in other contexts and on the extent of Congress's authority, under the Constitution, to establish new nonjudicial means of resolving disputes. In both Congress and the Executive Branch, considerable study has been given, and is now being

given, to the possible creation of non-Article III forums for the adjudication of the multitude of claims that arise in connection with federal programs and that would otherwise have to be litigated, at great expense and burden, in Article III courts. See, *e.g.*, Committee on Revision of the Federal Judicial System, U.S. Dep't of Justice, *The Needs of the Federal Courts* 7-11 (1977). These efforts would be greatly hampered if this Court were to hold that Article III precludes an administrative tribunal from adjudicating, with the parties' consent and subject to judicial review, counterclaims arising out of the same transaction that gave rise to a claim indisputably within the forum's decisional authority.

C. The Commission's Adjudication Of Conti's Counterclaim Is Consistent With Article III Because Schor Consented To That Adjudication

1. *Schor voluntarily elected to proceed before the CFTC with knowledge that this would permit the Commission to entertain Conti's counterclaim*

Schor plainly gave effective consent to the Commission's adjudication of Conti's counterclaim. As this Court held in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982), Schor could have brought suit against Conti in federal district court on his claim that Conti violated the CEA. The Seventh Circuit (the circuit in which Schor and Conti filed their district court claims) had confirmed in 1977 that there is an implied right of action under the CEA. *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8. When he elected to proceed before the CFTC, Schor unquestionably was aware that the Commission's regulations permitted Conti to bring

his state law counterclaim against him in the same, non-Article III forum. Indeed, Schor actively and repeatedly sought to avoid judicial resolution of his dispute with Conti for the express reason that he preferred to have the entire matter resolved in the CFTC reparations forum. See page 5, *supra*; J.A. 11-14, 17-20.

The court of appeals nevertheless ruled that Schor's voluntary and deliberate decision to proceed before the Commission did not constitute effective consent to the adjudication of Conti's counterclaim because Schor's consent was not "cost-free" (Pet. App. 39a); the court reasoned that the only way that Schor could avoid the adjudication of Conti's counterclaim by a non-Article III forum was to incur the "costs" of foregoing the convenience of having his own claim determined in that forum. This reasoning is manifestly fallacious: it would lead to the conclusion that no party's consent to a non-Article III proceeding is ever effective. Any party who consents to such a proceeding does so because he perceives some advantage in doing so—usually that the non-Article III proceeding will be less expensive and more convenient. But it certainly does not follow that if such a party does not prevail he may attack the adverse result by asserting that his consent was not "cost-free." See, *e.g.*, *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942) ("Simply because a result that was insistently invited * * * disappointed the hopes of the [party], ought not to be sufficient for rejecting it."). And in any event, the inevitable presence of disadvantages as well as advantages arising from the choice of one course rather than another has never been thought sufficient to undermine the voluntary nature of consent or of a waiver of rights. See

generally, *e.g.*, *United States* v. *Scott*, 437 U.S. 82, 93 (1978) (criminal defendant's mistrial motion "is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact"); *Boykin* v. *Alabama*, 395 U.S. 238 (1969) (defendant may waive his right to trial by pleading guilty).[17]

Indeed, this Court has consistently made it clear that choices of forum considerably more costly than the election made by Schor are completely effective. In *Thomas*, the Court found it significant that "no *unwilling* defendant [was] subjected to judicial enforcement power as a result of the agency 'adjudication.'" Slip op. 21 (emphasis added). The only persons possibly subject to judicial enforcement, the Court emphasized, were "follow-on" pesticide registrants "who explicitly consent[] to have [their] rights determined by arbitration." *Id.* at 22. That consent, however, is scarcely "cost-free." To the contrary, consent is a mandatory prerequisite to registration under the Federal Insecticide, Fungicide, and Rodenticide Act (see *Thomas*, slip op. 22): if the registrant withholds his "consent," he cannot obtain the required license to market his product. Such a burden is far greater than that faced by Schor, whose consent was required merely to gain the convenience of the administrative forum.

[17] The court of appeals based its requirement of "cost-free" consent on a decision addressing the effectiveness of consent to the referral of actions in federal court to magistrates. See Pet. App. 39a. Nothing in the Magistrates Act, however, would permit a party to consent to bring his claim before a magistrate without agreeing to permit the magistrate to decide factually intertwined counterclaims as well. In any event, the magistrates cases, including *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc), cert. denied, No. 83-1873 (Oct. 1, 1984), on which the court of appeals relied, in no way mandate that consent be "cost-free" in order to be effective. See 725 F.2d at 543 (only "serious burdens and costs" that would make reference to a magistrate a "compelled alternative" would vitiate effectiveness of consent); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir. 1984) (consent would not be effective "[i]f a litigant were required to wait ten years for a trial before an Article III judge").

Similarly, in *McElrath* v. *United States*, 102 U.S. 426 (1880), the plaintiff sued the government in the Court of Claims. When judgment was awarded against him on the government's counterclaim, he asserted that he had been denied his Seventh Amendment right to a jury trial. The Court decisively rejected this contention:

> Congress, by the act in question, [has] inform[ed] the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury * * *. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.

102 U.S. at 440. It follows *a fortiori* from *McElrath* that Schor's consent was effective, because Schor, unlike the plaintiff in that case, was not faced with the choice between exposing himself to a counterclaim and abandoning his claim altogether. The Court applied the same principle in *Katchen* v. *Landy*, *supra*, where it held that creditors who filed claims in a bankruptcy proceeding waived their right to a jury

trial on a counterclaim by the trustee: " 'By presenting their claims [respondents] subjected themselves to all the consequences that attach to an appearance.' " 382 U.S. at 335 (citation omitted); see also *Alexander* v. *Hillman*, 296 U.S. 222, 241-242 (1935).

2. *Article III does not prohibit the judicial enforcement of a decision reached in a non-Article III forum with the parties' consent*

a. A fundamental purpose of the provisions of Article III at issue in this case is to "assure impartial adjudication." *Thomas*, slip op. 13; see also, *e.g.*, *Northern Pipeline*, 458 U.S. at 58 (plurality opinion); *Palmore* v. *United States*, 411 U.S. at 412 (Douglas, J., dissenting) ("The safeguards accorded Art. III judges were designed to protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes."); *O'Donoghue* v. *United States*, 289 U.S. at 534 (citation omitted) (judicial independence is necessary to prevent " 'sacrificing the innocent to popular prejudice; and subjecting the poor to oppression and persecution by the rich' "); *The Federalist No. 78*, at 231 (A. Hamilton) (R. Fairfield 2d ed. 1981); *The Federalist No. 80*, at 238-239 (A. Hamilton) (R. Fairfield 2d ed. 1981); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 683-684 (1979). Indeed, Justice Brandeis took the view that any constitutional limitation on Congress's power to assign adjudicative tasks to administrative tribunals arises solely from the Due Process Clause, with its guarantee of an impartial decisionmaker. *Crowell* v. *Benson*, 285 U.S. at 87 (dissenting opinion); cf. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. Chi. L. Rev. 665, 698 (1969) (Article III protections were "not created for the benefit of the judges, but for the benefit of the judged"); see generally, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

To the extent, then, that Article III protects a personal right of the litigants, they must be free to elect to forgo that protection as with any other rights, including those relating to the tribunal before which a party is to be tried. Criminal defendants, for example, may waive their right to be tried by a jury. *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968); *Patton* v. *United States*, 281 U.S. 276 (1930); cf. Fed. R. Civ. P. 38(d) (waiver of right to jury trial in civil cases). Indeed, they may agree to dispense with a trial altogether. *Boykin* v. *Alabama*, 395 U.S. at 242-243; Fed. R. Crim. P. 11. Similarly, a State may waive its Eleventh Amendment protection from extension of the federal judicial power to a suit against it. *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 3.

In view of these well-established principles, it is not surprising that this Court has consistently held that the protections embodied in Article III are subject to waiver by the parties. See Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U. L. Rev. 1297, 1351 (1975) ("The right of civil litigants to consent to trial before a non-Article III judicial officer is long established."). For example, where parties to a suit in federal court voluntarily submit their dispute to a non-Article III special master or referee, the referee's decision may be given the force of a court order following only extremely deferential judicial review. See *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 267-268 (1932); *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 121-122 (1924); *Ex parte Peterson*, 253

U.S. 300, 314 (1920); *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U.S. 489, 494-495 (1912); *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889); *Newcomb* v. *Wood*, 97 U.S. 581, 583 (1878) ("In such an agreement [to refer the case to arbitrators] there is nothing contrary to law or public policy."); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 133 (1864); *Alexandria Canal Co.* v. *Swann*, 46 U.S. (5 How.) 83, 86 (1847); *Field* v. *Holland*, 10 U.S. (6 Cranch) 8, 20-21 (1810). See also *United States* v. *Armour & Co.*, 402 U.S. 673 (1971) (enforcing consent decree embodying settlement agreement reached by parties to action pending in federal court); Fed. R. Civ. P. 68 (offer of judgment).

The Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, similarly requires the judicial enforcement of decisions rendered by non-Article III decisionmakers with the consent of the parties. 9 U.S.C. 9. Congress enacted that statute for the same reason that it established the CFTC reparations program: to provide a quick and inexpensive means for the resolution of disputes. See, *e.g.*, *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974); *Wilko* v. *Swan*, 346 U.S. 427, 431-432 (1953); *Revere Copper & Brass, Inc.* v. *Overseas Private Investment Corp.*, 628 F.2d 81, 83 (D.C. Cir.), cert. denied, 446 U.S. 983 (1980); *Diapulse Corp.* v. *Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). Judicial review of arbitral awards is considerably more deferential than review of the CFTC's reparations decisions. Compare 9 U.S.C. 10 with 7 U.S.C. 9.

Indeed, in *Northern Pipeline*, the only case in which this Court has found an Article III barrier to Congress's establishment of an Article I dispute resolu-

tion tribunal, the absence of the consent of the parties was critical to the result and was recognized in each of the opinions in that case. See 458 U.S. at 80 n.31 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment); *id.* at 92 (Burger, C.J., dissenting); *id.* at 95 (White, J., dissenting). Subsequently, in *Thomas* v. *Union Carbide*, *supra*, the Court made it clear that *Northern Pipeline* depended on the absence of the "consent of the litigants." Slip op. 14. And this very Term, in a case under the Magistrates Act, the Court held that it is consistent with Article III for a party to waive her right to judicial review of a magistrate's decision. *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985). As the Court noted, "[a]ny party that desires plenary consideration by the Article III judge of any issue need only ask." Slip op. 13. The same is true here: Schor had full opportunity for judicial resolution of both his claim and Conti's counterclaim, but instead of asking for such a determination, he insistently sought administrative resolution of the dispute. Nothing in Article III requires that Schor's election be disregarded.

Consistently with this understanding of Article III, every court of appeals that has considered the question has upheld the constitutionality of 28 U.S.C. 636(c), which permits the reference of any civil case brought in federal district court, upon consent of the parties, to a non-Article III magistrate;[18] review of

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[18] *K.M.C. Co.* v. *Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985); *Gairola* v. *Virginia Department of General Services*, 753 F.2d 1281 (4th Cir. 1985); *D.L. Auld Co.* v. *Chroma Graphics Corp.*, 753 F.2d 1029, 1031-1032 (Fed. Cir. 1985); *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893-895 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984);

the magistrate's determinations is, again, more deferential than review of the CFTC's reparations awards. These courts have relied in large part on the consent of the litigants in holding that magistrates may enter judicially enforceable orders in cases referred to them. See, *e.g.*, *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 894 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir. 1984) ("Once the parties have waived their right to Article III protections, they should not be allowed to challenge the constitutionality of the provisions under which they voluntarily chose to proceed."); *Collins* v. *Foreman*, 729 F.2d 108, 119 (2d Cir. 1984), cert. denied, No. 83-1616 (Oct. 1, 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32, 35-36 (1st Cir. 1984), cert. denied, No. 84-5 (Oct. 1, 1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984) (en banc) (it would be "anomalous" to "forbid[] waiver in a civil case of the personal right to an Article III judge"), cert. denied, No. 83-1873 (Oct. 1, 1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922, 928-

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Lehman Bros. Kuhn Loeb, Inc. v. *Clark Oil & Refining Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984) (en banc), cert. denied, No. 84-519 (Jan. 14, 1985); *Puryear* v. *Ede's, Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984), cert. denied, No. 83-1616 (Oct. 1, 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984), cert. denied, No. 84-5 (Oct. 1, 1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc), cert. denied, No. 83-1873 (Oct. 1, 1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922, 929-930 (3d Cir. 1983). See also *United States* v. *Ferguson*, No. 85-5502L (4th Cir. Dec. 5, 1985), slip op. 5; *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985), cert. denied, No. 84-1683 (Oct. 7, 1985).

930 (3d Cir. 1983). Cf. *United States* v. *Raddatz*, 447 U.S. 667, 711 (1980) (Marshall, J., dissenting) (emphasis added) ("[T]here remain some cases in which an *opportunity* for an independent judicial determination of the facts is constitutionally required.").

b. Article III is intended to "protect the role of the independent judiciary within the constitutional scheme of tripartite government" as well as to safeguard the rights of individual litigants. *Thomas*, slip op. 13; see also, *e.g.*, *O'Donoghue* v. *United States*, 289 U.S. at 533. In large measure, of course, these two purposes of Article III are consistent and indeed complementary: an independent judiciary is most valued in order to ensure "a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 217-218 (1980); *O'Donoghue*, 289 U.S. at 531 (independence ensures that the judiciary's "judgment or action might never be swayed in the slightest degree"). Accordingly, it will be the unusual case where the interest of the litigants in a fair hearing before a decisionmaker not subject to influence by the other branches of government will diverge from the public interest in an independent judiciary. And it would be a rare case indeed where that divergence is so marked that the litigants' voluntary election to submit their dispute to a non-Article III tribunal must be deemed constitutionally ineffective. Cf. *Duncan* v. *Louisiana*, 391 U.S. at 156 (right to jury trial in criminal cases is subject to waiver even though that right is related to the protection afforded by "an independent judiciary" and it "reflect[s] a fundamental decision about the exercise of official power * * * [and the Framers']

insistence upon community participation in the determination of guilt or innocence").

This is plainly not that rare case. The CFTC's adjudication, subject to judicial review, of counterclaims that arise out of the same transaction as a reparations complaint between private persons in no way threatens the independence of Article III judges. Nor does it jeopardize the judiciary's ability to function effectively as the ultimate interpreter of the law and, hence, as a constitutionally provided check on the other branches of government. Accordingly, there is no basis in these circumstances for the Court to hold, for the first time, that parties may not agree to submit their dispute to a non-Article III decisionmaker.[19]

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[19] We note that the rule that defects in subject matter jurisdiction are not waivable has no bearing on this case. That doctrine merely permits a federal court to inquire into its own jurisdiction at any stage of a proceeding, notwithstanding the parties' failure to raise the issue in a timely fashion. See, *e.g.*, *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 382 (1884); Fed. R. Civ. P. 12(h)(3); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-536 (1962) (plurality opinion) (permitting party to raise for first time on appeal question whether federal judge who heard case was protected by Article III tenure and salary provisions). Here, by contrast, the question has nothing to do either with the limited jurisdiction of the federal courts or with the consequences of a procedural default. Rather, the issue is the relevance of the parties' consent to whether the CFTC could adjudicate the case before it. Consent plainly is material to the inquiry in this context, just as it is with respect to adjudication by referees, magistrates, and arbitrators. Indeed, the jurisdiction of the federal courts may be made to depend on consent. See *Williams* v. *Austrian*, 331 U.S. 642, 652-653 (1947); *Schumacher* v. *Beeler*, 293 U.S. 367 (1934). Certainly there is nothing precluding a similar rule with respect to administrative agencies.

This case does not involve any limitation on the salary and tenure protections accorded judges in Article III courts. Compare *United States* v. *Will*, *supra* (salary dispute); *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962) (judges of former Court of Claims and Court of Customs and Patent Appeals protected by Article III); *O'Donoghue* v. *United States*, *supra* (former Supreme Court and Court of Appeals of the District of Columbia constituted under Article III). And unlike cases addressing the authority of magistrates, this case does not involve any question of the delegation of authority within the federal judiciary or any other issue concerning how the judiciary goes about its business. Compare *Thomas* v. *Arn*, *supra* (failure to seek review of magistrate's order before district court may waive right to review in court of appeals); *United States* v. *Raddatz*, *supra* (magistrate may hear evidence and make recommendation on suppression motion).[20]

There is, in sum, no realistic basic for contending that the CFTC's consensual adjudication, subject to

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[20] There is no pertinence here to the objection sometimes voiced to the Magistrates Act on the ground that consensual reference to magistrates may erode the institution of the federal judiciary "'from within, rather than without the judicial department'" (*Northern Pipeline*, 458 U.S. at 79 n.30 (plurality opinion), quoting *United States* v. *Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring)). See generally, *e.g.*, *Goldstein* v. *Kelleher*, 728 F.2d at 36 (upholding Magistrates Act); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d at 543-544 (same). Whatever concerns over delegation that might prompt a court to conclude that consent is not a complete answer to the Article III issue in the magistrates context simply are not present here. See Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023, 1048-1051 (1979).

judicial review, of state law counterclaims arising out of the same transaction as a reparations complaint threatens in any way to undermine the constitutionally assigned role of the federal judiciary. See generally *Thomas*, slip op. 17 ("practical attention to substance * * * should inform application of Article III"); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d at 547 ("It is faithful to the idea of separation of powers to examine the real consequences of the statute."). This case obviously does not involve the "transfer [of] jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Tidewater Transfer Co.*, 337 U.S. at 644 (Vinson, C.J., dissenting); see also P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 396 (2d ed. 1973) (noting that constitutional concerns would be raised by the "wholesale assignment of federal judicial business to legislative courts, not tied to valid and specific substantive necessities"). The fact that Conti's counterclaim technically arises under state law—a species of claim typically resolved by non-Article III judges—is surely no reason to find the parties' consent any less effective than it would be for federal law claims. Cf. *Northern Pipeline*, 458 U.S. at 98 (White, J., dissenting); see generally Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 Duke L.J. 197, 210 ("The danger of both potential federal government domination of the federal judiciary and potential governmental displeasure with judicial decisions is at a minimum in suits between private individuals involving state-created common law rights.").

For all of these reasons, Schor's consent conclusively answers any Article III objection to the CFTC's adjudication of Conti's counterclaim and thus fully suffices to dispose of this case. Moreover, as we shall now show, a number of other features of the Commission's reparations forum independently establish the constitutionality of its counterclaim rule.

D. Article III Does Not Preclude The CFTC From Exercising Ancillary Jurisdiction Over Counterclaims That Arise Out Of The Same Transaction As a Reparations Complaint

In *Crowell* v. *Benson*, *supra*, this Court established that it is consistent with Article III for administrative agencies to adjudicate rights between individuals. Last Term, the Court unambiguously reaffirmed the continuing validity of *Crowell* in *Thomas* v. *Union Carbide Agricultural Products Co.*, *supra*. Under *Crowell*, the CFTC plainly has the constitutional authority to adjudicate, subject to judicial review, reparations complaints arising under the Commodity Exchange Act. *Myron* v. *Hauser*, 673 F.2d at 1005; *Rosenthal & Co.* v. *Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978). *Crowell* and *Thomas*, which eschew "doctrinaire reliance on formal categories," *Thomas*, slip op. 17, in favor of substance and pragmatic considerations, strongly support the constitutionality of the Commission's authority, in this specialized financial area, to entertain counterclaims that arise out of the same transaction that forms the basis for a reparations complaint, wholly apart from Schor's consent to the adjudication.

1. Under its counterclaim rule, the Commission adjudicates only those counterclaims that, like Conti's, arise out of the same transaction as a complaint for reparations. As we have explained, the Commission's ability to entertain such counterclaims is a necessary

element of the entire reparations scheme. This "pragmatic solution to [a] difficult problem," *Thomas*, slip op. 20, is wholly consistent with Article III.

The counterclaims subject to Commission adjudication would be compulsory counterclaims in federal court under Fed. R. Civ. P. 13(a). As such, they would be within the court's ancillary jurisdiction and therefore subject to determination in that forum even in the absence of an independent jurisdictional basis. See *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 609 (1926); 3 J. Moore, *Moore's Federal Practice* ¶ 13.15[1] (2d ed. 1985). The reason for such a rule is plain: because of the strong incentives for avoiding piecemeal litigation, parties would be deterred from taking advantage of a forum in which they could not resolve the entire controversy between them. See *Moore*, 270 U.S. at 610; 6 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1414 (1971); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 167 (1953); cf. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966) (pendent jurisdiction); see generally *Alexander* v. *Hillman*, 296 U.S. at 242 (courts of equity, "having jurisdiction of the parties to controversies brought before them, * * * will decide all matters in dispute and decree complete relief"); *Katchen* v. *Landy*, 382 U.S. at 355 (same).

The same considerations, of course, support the Commission's exercise of ancillary jurisdiction over counterclaims such as Conti's. See pages 24-27, *supra*. Indeed, this Court has held that a state law claim may be adjudicated by a non-Article III federal body, subject to judicial review, when it is ancillary to a federal law dispute. *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943)

(Interstate Commerce Commission may decide indenture trustee's claim for expenses in connection with railroad reorganization proceeding); cf. *Tidewater Transfer Co.*, 337 U.S. at 652 n.3 (Frankfurter, J., dissenting) (Congress may exercise its Article I bankruptcy powers to require claim to be brought in federal court even if "a particular claim dissociated from the fact of bankruptcy would have to be brought in a State court for want of any ground of federal jurisdiction"). Once a case is properly in an administrative forum, we perceive no Article III value that could possibly be impinged by allowing the tribunal to entertain those counterclaims that arise out of the same transaction as the main claim and therefore must be decided in order to resolve the dispute.[21]

2. In addition, the CFTC's adjudication of Conti's counterclaim is identical in all material respects to the adjudication upheld in *Crowell* v. *Benson*, *supra*.

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[21] *Northern Pipeline* does not cast any doubt on this conclusion. There, the bankruptcy courts' jurisdiction extended far beyond ancillary, factually intertwined claims to all matters "related to" a bankruptcy proceeding, which included virtually any matter whatever in which the debtor was a party. See 458 U.S. at 54 (plurality opinion). The CFTC's jurisdiction is, in contrast, extremely circumscribed, and it is subject to the same readily identifiable limitations as is the ancillary jurisdiction of the federal courts pursuant to Fed. R. Civ. P. 13(a). Unlike the bankruptcy courts under the 1978 Act, the CFTC does not "entertain a wide variety of cases," a "broad range of questions," or "the entire range of federal and state controversies." 458 U.S. at 54, 74, 75 n.28 (plurality opinion). In short, the CFTC's adjudication of counterclaims, unlike the adjudication at issue in *Northern Pipeline*, is "merely incidental" to the tribunal's determination of a federal cause of action. *Id.* at 80 n.31 (plurality opinion).

In that case, the Court rejected an Article III challenge to the nonconsensual adjudication of claims under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, by the United States Employees' Compensation Commission, a non-Article III administrative body. The factual rulings of the Compensation Commission, like those of the CFTC, were reviewable by an Article III court but could be set aside only if not supported by the evidence (285 U.S. at 46);[22] the legal rulings of the Compensation Commission, like those of the CFTC, were subject to de novo review (*id.* at 45, 49). The CFTC—in its consideration of both claims under the CEA and counterclaims arising from the same transactions—resembles the Compensation Commission in that it has "the obvious purpose of * * * furnish[ing] a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Id.* at 46.

The court of appeals ruled that the CFTC's counterclaim jurisdiction was at least presumptively inconsistent with Article III because it concerns private rather than public rights. Pet. App. 25a-27a. But that was true in *Crowell* as well, where the Court specifically stated that the case did not concern " 'public rights,' " 285 U.S. at 50 (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18

[22] The Court's conclusion in *Crowell* that the Compensation Commission's findings with respect to "jurisdictional" facts were subject to de novo review (285 U.S. at 54-64) has been seriously eroded by subsequent developments. See, *e.g.*, S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* 54-55 (1st ed. 1979).

How.) 272, 284 (1855)), but was instead "one of private right, that is, of the liability of one individual to another under the law as defined." 285 U.S. at 51. Moreover, the Court in *Thomas* expressly rejected the wooden notion, relied on by the court of appeals, Pet. App. 25a, that "the right to an Article III forum is absolute unless the federal government is a party of record." *Thomas*, slip op. 16; see also *id.* at 6 (Brennan, J., concurring in the judgment) ("[T]he analysis elaborated by the plurality in *Northern Pipeline* does not place the federal government in an Art. III straightjacket whenever a dispute technically is one between private parties.").

The Court's recent decision in *Thomas* v. *Union Carbide*, *supra*, also directly supports the constitutionality of the Commission's counterclaim rule. The Court admonished in *Thomas* that Article III requires "practical attention to substance." Slip op. 17. Accordingly, the Court analyzed the concerns that prompted Congress to establish an arbitration scheme under FIFRA, and it addressed the actual effect of that scheme on the values underlying Article III. Slip op. 19-23. The Court noted a number of factors that supported its conclusion that the scheme is constitutional, including Congress's intent to achieve the goals of the federal regulatory scheme, the consent of the parties, and the availability and scope of review by an Article III tribunal. The pragmatic concerns underlying Congress's establishment of the CFTC reparations program, which we have discussed above, amply justify the Commission's jurisdiction over counterclaims, just as similar practicalities supported the administrative schemes upheld in *Crowell* and in *Thomas*.

3. The court of appeals appeared to rest its decision in large part on what it viewed as the state-law

source of Conti's counterclaim. In particular, the court on remand dismissed the relevance of the pragmatic inquiry mandated by *Thomas* with the cursory observation that the Court's reasoning applied only to federally created rights. Pet. App. 5a. For a number of reasons, however, that distinction is not controlling—or persuasive—in the present context.[23]

In the first place, as we have explained, the Commission's assertion of jurisdiction over Conti's state law counterclaim does not threaten the role of the federal judiciary as the ultimate expositor of federal law. Moreover, the statute that provided the cause of action adjudicated in *Crowell* "displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire." *Thomas*, slip op. 17. Here as well, the contracts giv-

[23] There is nothing inherent in state law that prevents federal administrative agencies from adjudicating state law issues in appropriate circumstances. In *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932), for example, the Court described the scheme under which the Interstate Commerce Commission awarded reparations based on a shipper's common law right to recover where a carrier has charged unreasonable rates. See *id.* at 383-385. See also, *e.g.*, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (administrative award of restitution where regulated party departed from rates charged in contract); *Shell Oil Co.*, 29 F.P.C. 498, 500-501 (1963) (agency's decision on rates predicated on interpretation of contract); *Andrews Bros.* v. *Central Produce Co.*, 203 F.2d 949 (6th Cir.) (allowing state law counterclaim in reparations proceeding under 7 U.S.C. 499a), cert. denied, 346 U.S. 855 (1953). We perceive nothing in Article III that would deny administrative agencies the same power to decide state law issues in the context of counterclaims. Indeed, it is commonplace—and wholly consistent with our federal system and the rule of law—for federal questions to be decided in state adjudicatory forums and state questions in federal forums.

ing rise to debit balance counterclaims are subject to Congress's broad grant of regulatory jurisdiction to the Commission.[24] Certainly there is no reason to require the CFTC fully to preempt state law [25] in order to be able to adjudicate these counterclaims consistently with Article III.

In addition, the court of appeals' facile treatment of reparations counterclaims as "garden variety matter[s] of state common law," Pet. App. 5a, is questionable. Although these counterclaims involve contract rights, they are intertwined with and dependent upon claims brought under the CEA, an exclusive federal regulatory scheme that authorizes the Commission to regulate all aspects of the relationship between commodity brokers and their customers. See page 43 note 21, *supra*. Moreover, the counterclaims arise in reparations proceedings, which, like the Commission's own enforcement actions, serve the public interest of ensuring the fitness of CFTC registrants and redressing wrongful conduct by them. And, significantly, while state law is ultimately the source

[24] Congress has vested the Commission with "exclusive jurisdiction" to regulate commodity futures transactions and with expansive rulemaking authority. 7 U.S.C. 2, 12a(5). The Commission thus has the power to regulate the agreements between commodity brokers and their customers that give rise to debit balance claims, and it has exercised that authority in certain respects. For instance, the Commission's regulations prohibit brokers from including in customer agreements any provision guaranteeing the customer against loss. 17 C.F.R. 1.56. Furthermore, the Commission regulates the disclosure and arbitration provisions contained in customer agreements. 17 C.F.R. 1.55, 180.3.

[25] See generally, *e.g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 5.

for reparations counterclaims, the Commission does not ordinarily have to resolve any contested issue of state law relating to those claims based, as was Conti's, on customer agreements.[26] Rather, the Commission's ruling on the counterclaim is necessarily dependent on, and usually follows inexorably from, its adjudication of the CEA claim, plainly a matter of federal law. In substance, then, reparations counterclaims are, like the reparations claims themselves, adjudicated under federal, not state, law. See 7 U.S.C. 18.[27] For these reasons, the resolution of reparations counterclaims, in substance, bears many of the features of "public rights" as identified by the Court's "pragmatic understanding" in *Thomas*. Slip op. 19. In these circumstances, we are unable to identify any Article III value that would be jeopardized by the Commission's adjudication of Conti's counterclaim.

4. Finally, the Commission's counterclaim rule is fully consistent with the plurality opinion (as well as the other opinions) in *Northern Pipeline*. The court of appeals treated the plurality opinion as controlling authority on the Article III question even on

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[26] The parties did not contest, and the Commission did not resolve, any question of state law in this case.

[27] Indeed, because decision on the broker's counterclaim is dependent on the Commission's decision on the customer's main claim, the CFTC's resolution of the CEA issues would effectively determine the outcome of any later action brought by the broker in court to recover on the debit balance. See generally *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (administrative findings entitled to preclusive effect in subsequent judicial proceedings). There is no basis in Article III for prohibiting the agency from achieving the same result directly by adjudicating the counterclaim in the first instance.

remand following the Court's decision in *Thomas* and even though it acknowledged that CFTC adjudication of state law counterclaims does "not exhibit all of the Article III flaws the *Northern Pipeline* plurality discovered in the 1978 Bankruptcy Act." Pet. App. 33a n.24; see also *id.* at 6a, 7a n.15. In fact, the plurality in *Northern Pipeline* was careful to reconcile its conclusion with *Crowell* v. *Benson*, *supra;* the way in which the plurality did so demonstrates that CFTC adjudication of counterclaims far more closely resembles the functions of the Compensation Commission than it does those of the bankruptcy judges under the 1978 Act, notwithstanding the state law source of debit balance counterclaims.

Unlike the bankruptcy judges in *Northern Pipeline*, the CFTC deals only with a highly "particularized area of law" (*Northern Pipeline*, 458 U.S. at 85); the state law claims that it entertains extend only to those that arise out of the same commodity futures transactions that give rise to federal claims in that particularized area, and they typically require resolution of the same factual and indeed legal issues as the federal claims. See pages 47-48, *supra*. The CFTC "engage[s] in statutorily channeled factfinding functions" and "possess[es] only a limited power to issue compensation orders pursuant to specialized procedures"; unlike the bankruptcy judges, it does not exercise "all ordinary powers of district courts." 458 U.S. at 85. Moreover, CFTC orders are reviewable under a standard comparable to that which applied in *Crowell*, not under the "clearly erroneous" standard applicable to the determinations of bankruptcy judges. See 458 U.S. at 85; 7 U.S.C. 9. "[I]n the[se] circumstances, the review afforded preserves the 'appropriate exercise of the judicial function.'" *Thomas*, slip op. 22 (quoting *Crowell*, 285 U.S. at 54).

In sum, *Thomas* v. *Union Carbide*, *supra*, controls this case. Indeed, the consensual element here is even more pronounced than it was in *Thomas* because the respondent here, unlike the appellee there, had the option to litigate the matter in federal district court but elected to forgo that opportunity in favor of adjudication by the Commission. Moreover, judicial review of the Commission's determination here is not restricted in the manner specified by Congress for review of awards under the arbitration scheme at issue in *Thomas* (see slip op. 4, 22-23). The result here, therefore, follows *a fortiori* from the Court's holding in *Thomas*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 85-621 and 85-642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Petitioner,

v.

WILLIAM T. SCHOR, *et al.*,
Respondents.

CONTICOMMODITY SERVICES, INC.,
Petitioner,

v.

WILLIAM T. SCHOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Commodity Exchange Act, before the 1983 Amendments, gave the Commodity Futures Trading Commission subject matter jurisdiction to hear counterclaims based entirely on a state common law cause of action.

2. Whether, if the Act did confer such jurisdiction, that grant of power over state law claims violates Article III of the Constitution under the principles of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

3. Whether a party to a proceeding before the Commission may confer jurisdiction, otherwise barred by Article III, by consent and, if so, whether respondent consented here.

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IN THE

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BRIEF FOR RESPONDENTS

STATEMENT

The issue in this case is whether the Commodity Futures Trading Commission (the "Commission") may exercise jurisdiction over a counterclaim arising solely under state law. The Commission entered judgment on such a counterclaim in this case against respondents

("Schor") and in favor of petitioner Conticommodity Services, Inc. ("Conti"). The court of appeals, finding lack of jurisdiction, reversed.

The facts are set forth in the court of appeals' opinion and need not be repeated in detail here. Commission Pet. App. 9a-14a. In brief, Schor opened accounts with petitioner Conti, a futures commission merchant, for the purpose of trading in financial futures.[1] Approximately three years later, in October 1979, following a disagreement between the parties, petitioner Conti liquidated those accounts. After liquidation, the accounts showed a debit balance. *Id.* at 11-12a.

In February 1980, Schor filed a reparations complaint with the Commission seeking to recover for trading losses suffered while a customer of petitioner Conti.[2] Conti then filed counterclaims, based not upon the Act but upon state law, for the debit balances in the accounts.[3] Schor challenged the jurisdiction of the Commission over the counterclaims, arguing that the Act provided no authority to adjudicate claims arising under state law. *Id.* at 37a.

The Administrative Law Judge issued an initial decision denying Schor's claims and awarding judgment to Conti on his counterclaims. The Judge remarked that the challenge to jurisdiction over the counterclaims raised "a neat legal point" but that he was "bound by agency regulations and published agency policies." *Id.*

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[1] "Financial futures are contracts to buy or sell interest-bearing investments on a fixed future date." Commission Pet. App. at 10a n.2.

[2] The complaint alleged violations of the Commodity Exchange Act and various regulations promulgated thereunder.

[3] Although Conti had previously filed an action in federal court for these balances, it chose to dismiss that action voluntarily. *Id.* at 13a n.6. Respondents had opposed the federal action on the ground, *inter alia*, that it should have been brought before the Commission.

at 62a-63a. The Commission then allowed the decision to become final. It made no reference to the question of jurisdiction over common law claims.

The court of appeals reversed. Having raised *sua sponte* the question whether the Commission could decide state claims consistently with Article III of the Constitution, the court found that such an exercise of jurisdiction would give rise to serious constitutional questions. *Id.* at 21a, 40a-41a. In reaching this conclusion, the court placed particular reliance on the decision in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982), where this Court held that non-Article III bankruptcy judges could not exercise jurisdiction over common law claims against the will of a party. The court of appeals concluded that the filing of his own reparations complaint before the Commission was not sufficient "consent" by Schor to justify an exception to the principles established in *Northern Pipeline*.

The court of appeals, however, did not rest its decision on constitutional grounds. Rather, it examined the Act to determine "whether a construction of the statute is fairly possible by which the [serious constitutional] question may be avoided." *Id.* at 21a. Reviewing the Act and its legislative history, the court found no clear evidence that Congress intended to confer jurisdiction over common law claims. *Id.* at 41a-49a. Indeed, noting that Congress had not conferred similar jurisdiction upon other administrative bodies, the court said that the position taken by the Commission, if upheld, would give it "unprecedented authority." *Id.* at 48a. The court thus construed the Act "to authorize the [Commission] to adjudicate only those counterclaims alleging violation of the Act or Commission regulations." *Id.*

This Court vacated that judgment, remanding for reconsideration in light of *Thomas* v. *Union Carbide Agri-*

cultural Products Co., 105 S.Ct. 3325 (1985). The court of appeals, observing that *Thomas* "arose entirely within the confines of federal law, and that a federal rule of decision, exclusively, was at stake," Commission Pet. App. at 4a, reinstated its judgment on remand.

SUMMARY OF ARGUMENT

I. The Commodity Exchange Act, 7 U.S.C. (and Supp. II) 1 *et seq.*, does not give the Commission the power to adjudicate state-law counterclaims. As the court of appeals pointed out, the grant of such jurisdiction would be a remarkable departure from the practice followed by Congress with regard to other federal agencies. Commission Pet. App. at 47a-48a. In addition, it would place the agency in the position of awarding or denying relief solely according to state law, a position of unusual sensitivity in our federal system. Before the Commission is allowed to assume such jurisdiction, therefore, the intent of Congress to confer it should be clear.

That intent is anything but clear here. Although the Act speaks of counterclaims, it gives no indication that the term was meant to include counterclaims outside the scope of the Act itself. Indeed, while representatives of the commodity industry pressed Congress to delineate the power of the Commission over counterclaims, Congress declined to do so. The Commission, in its own proposed regulations, recognized that its authority over non-Act counterclaims was doubtful. In view of these mixed indications, the grant of power to the Commission should be narrowly construed.

A narrow construction of the Act is even more appropriate because it avoids the constitutional problems raised by petitioners' position. If Congress did intend to confer jurisdiction over state-law counterclaims, that grant of power is prohibited by Article III of the Constitution. This Court has frequently held that the federal courts

should "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question can be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). The same principle can and should be followed here.

II. Article III prohibits Congress from giving the Commission the power to decide state-law counterclaims. Those claims were within the "pre-existing" jurisdiction of the state courts at the time that Article III was drafted, and they must be decided either by Article III courts or by state courts.

The history of Article III makes this clear. Unlike the grant of judicial power over federal claims, the decision to extend federal jurisdiction to state-law claims met with considerable opposition. The principal basis for objection was that the exercise of federal jurisdiction would seriously devalue the authority of state courts in commercial and other traditional state-law actions. Although this concern gave way in the final version of Article III, the granting of power in diversity cases was justified largely on the basis of the greater independence and competence of judges protected by the tenure and salary provisions of Article III, Section 1. Because members of the Commission lack just such protection, it would be inconsistent with the understanding inherent in Article III to give them a share of the federal judicial power over state-law claims.

The cases decided by this Court fully support that conclusion. In the only case directly addressing the authority of a non-Article III tribunal over state-law claims, the Court held that the tribunal lacked such authority. *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982) (*Northern Pipeline*) (Article I bankruptcy court); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). Although the Court has held upon occasion that an alternative tribunal may decide cases

within the federal judicial power conferred by Article III, those cases did not involve questions of state law within the pre-existing jurisdiction of state courts and, as a consequence, did not present the unusual problems arising from the exercise of federal power over state matters. See, e.g., *Thomas* v. *Union Carbide Agricultural Products Co.*, 105 S.Ct. 3325 (1985); *Palmore* v. *United States*, 411 U.S. 389 (1973); *Crowell* v. *Benson*, *supra*. Thus, whatever power Congress may have to establish alternative tribunals to define and apportion federal rights, that power does not extend to the creation of a third system of courts with jurisdiction over state claims.

These principles cannot be set aside in this case because of "consent" of the parties. This Court has held that, as with other jurisdictional constraints, the parties cannot consent to an impermissible adjudication by a non-Article III judge. See *Glidden Co.* v. *Zdanok*, *supra*. In any event, there was no consent here. Respondent objected to the exercise of jurisdiction over the state-law counterclaim, and Article III requires that the objection be honored.

ARGUMENT

I. The Court Of Appeals Below Correctly Held That The Commodity Exchange Act Does Not Authorize Reparations Awards On State-Law Counterclaims.

The court of appeals correctly concluded that section 14 of the Commodity Exchange Act, 7 U.S.C. § 18 (the Act), prior to its amendment in 1983, did not authorize the Commission to entertain state common law counterclaims.[4] As the court found, any other construction would raise serious constitutional questions under Article III. Commission Pet. App. at 21a, 40a-41a; see pages 16-43

[4] Although we believe that the Commission lacks jurisdiction following the 1983 Amendments as well, the Court need not address that issue in this case.

infra. But, even if concerns about Article III were not present, the Act still cannot be read as expressing the intent of Congress to confer this remarkable authority on the Commission.

Petitioners do not dispute that the jurisdiction asserted by the Commission over state-law claims is highly unusual. As the court of appeals pointed out, Commission Pet. App. at 47a-48a, the Commission has conceded in this case that it "is not aware of any other agencies that expressly render decisions and issue awards on common law claims." Under these circumstances, the court observed that it "would be extraordinary for a legislature to deliver such a [jurisdictional] blank check to an administrative tribunal." *Id.* In our view, a clear showing of Congressional intent must be required to support such an "extraordinary" action, particularly where the result is to place an administrative agency in the middle of disputes decided solely by reference to state law. See generally *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371 (1985) (Congressional intent to preempt state law must be clear).

There is no clear evidence of that intent here. Petitioners' main contention is that, since the Act and its legislative history contain references to counterclaims, Congress must have intended to confer jurisdiction over non-Act counterclaims. But this analysis only begs the question. The issue is not whether Congress envisaged counterclaims but whether it contemplated and intended *non-Act* counterclaims. On that issue, the Act and legislative history point, if anything, in the opposite direction.

To begin with, we note that the focus of the Act is unmistakably on claims arising under its provisions. At the time that this claim arose, Section 14 of the Act limited reparations awards to those caused by violations of the Act, not once but three times. In Section 14(a), it limited applications to the Commission to those "com-

plaining of any violation of any provision of this chapter or any rule, regulation or order thereunder by any person who is registered or required to be registered under [the Act]." 7 U.S.C. (1976 ed.) § 18(a). In Section 14(c), it required the Commission to "determine whether or not the respondent has violated any provision of this chapter or any rule, regulation or order thereunder." 7 U.S.C. (1976 ed.) § 18(c). And, in Section 14(e), it authorized the Commission to "determine the amount of damage, if any, to which such person is entitled as a result of such violation" if "the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation or order thereunder." 7 U.S.C. (1976 ed.) § 18(e). Thus, it seems evident that Congress was concerned mainly with providing relief under the Act itself, not with resolving all possible disputes between customers and registrants.

As a related matter, we also note that the overriding aim of the legislation was to afford a remedy for customers against registrants, rather than vice-versa. The Commission itself has recognized as much. In *Friedman v. Dean Witter and Company, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21, 307 (CFTC) (1981), while holding that its current counterclaim regulation was valid, the Commission stated: "Clearly, reparations was designed primarily as a forum in which customers might vindicate grievances against commodity professionals where violations of the Act and regulations are involved, *and not for debit balance collection at the behest of commodity professionals.*" *Id.* at p. 25,538 (emphasis supplied).

Although petitioners correctly note that Section 14(d) (now relettered as Section 14(c)) referred to counterclaims against non-resident complainants, and that Sections 14(f) and (g) [7 U.S.C. (1976 ed.) § 18(f) and (g)] referred to proceedings by "any person" and "any

party," those general references shed no light on Congressional intent regarding *non*-Act counterclaims. This ambiguity is perhaps best illustrated by the fact that, despite this language, the Commission itself identified at least a "substantial question" about its authority to entertain counterclaims not based on violations of the Act. 40 Fed. Reg. 55,667 (1975) . Thus, over a decade ago, the Commission regarded the question of its jurisdiction over non-Act counterclaims as so questionable that it first proposed regulations limiting its jurisdiction to counterclaims based on complainants' violations of the Act and brought against persons required to register under the Act. 40 Fed. Reg. 55,666-55,667 and 55,672-55,673 (1975).[5]

The Commission had good grounds for its early doubt that Congress intended to give it jurisdiction over non-Act counterclaims.[6] When the Act was under considera-

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[5] Although the Commission now suggests that counterclaims under the Act "virtually never arise," Commission Br. at 23, its view has not been constant. In its original proposed counterclaim regulation, the Commission obviously recognized there could be counterclaims under the Act; that regulation would have restricted counterclaims to those based on the Act. 40 Fed. Reg. 55,666-55,667 and 55,672-55,673 (1975). Indeed, as recently as August 20, 1985, the Commission recognized the existence of counterclaims under the Act when it limited its stay of reparations proceedings because of the court of appeals' decision here to those "in which counterclaims *that do not allege a violation of the Act* or the Commission's regulations have been filed . . ." (Emphasis supplied.) *In the Matter of Various Reparations Proceedings in Which Counterclaims Have Been Filed,* [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,674 (August 20, 1985).

[6] The administrative law judge in this case also seemed to find the issue troubling. In the Initial Decision in this case, while addressing respondents' argument that the Act empowers the Commission to award damages only for a violation of the Act and that allowing non-Act counterclaims is *ultra vires,* Administrative Law Judge Painter stated: "This may be a neat legal point. However,

tion, representatives of the commodity industry advocated that Congress delineate the scope of permitted counterclaims. Congress, however, declined to do so. *Commodity Futures Trading Commission Act of 1974: Hearings On H.R. 11955 Before the House Comm. on Agriculture*, 93 Cong., 2d Sess. 97, 169 and 254 (1974). Thus, in spite of this apparently unanimous plea by the industry, Congress in 1974 decided not to state in the Act or elsewhere that non-Act counterclaims were to be entertained by the Commission. This steadfast silence continued in the 1983 Amendments even though the question of jurisdiction had been raised both in this case and in *Friedman v. Dean Witter & Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 at 25,538 (Nov. 13, 1981).[7]

Although petitioners argue that statements at the time of the 1983 Amendments support their position, that argument has several weaknesses. In the first place, this Court has stated and reiterated that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. *Russello v. United States*, 464 U.S. 16 (1983); *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, 460 U.S. 150, 165, fn. 27 (1983); *United States v. Price*, 361 U.S. 304 (1960). Views in-

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an administrative law judge is bound by agency regulations and published agency policies. The rules provide for counterclaims." Commission Pet. App. at 62a-63a.

[7] One obvious reason that legislatures omit words from a statute is that the statute would not otherwise have passed. *See generally Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974) (deletion of provision from bill is strong indication of Congressional intent). No one can say here that a provision in Section 18 of the Commodity Exchange Act, expressly authorizing non-Act counterclaims, would have been approved. What can be said is that the legislation and its history gave no notice to members of Congress who voted on it that such authority was included. For that reason alone the Court should let Congress express unequivocally its intent to confer this unprecedented authority.

ferred from the silence of a later Congress presumably are even more hazardous.[8]

The history cited is also unpersuasive. For example, the Commission brief points to language in the legislative history of the 1983 amendments, stating that the reparations program seeks to decide the entire controversy including counterclaims. Yet, in the same report, the Senate Committee states, with reference to the rulemaking provisions of the 1983 amendments, that "[t]hese provisions, however, do not absolve the Commission from complying with the parties' due process and other rights under the Constitution." S. Rep. No. 384, 97th Cong., 2d Sess. 48 (1982). If anything, therefore, this history suggests that Congress was wary of exceeding the constitutional limits of agency power.

The government also relies upon a 1983 provision authorizing the Commission to terminate a customer's trading privileges for non-payment of a broker's counterclaim. Again, however, this provision makes no mention of non-Act or state-law counterclaims. Furthermore, it imposes a sanction on a customer equal to the sanction imposed on a broker for violating the Act. If the Commission were correct, therefore, this provision would convert a reparations procedure established to enforce compliance with the Act into a new method of enforcing pay-

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[8] Indeed, in one case, the Court found that agency action was beyond its statutory charter despite longstanding consistent agency construction, Congressional reenactment of the questioned language, and *express Congressional Committee approval of the agency construction. SEC v. Sloan*, 436 U.S. 103 (1978). The Court found all this overcome by the wording of the Act, the pattern of the statute as a whole, and the unusually broad power that a contrary interpretation would vest in the agency. Here, unlike *Sloan*, the agency construction has not been consistent and there has been no express Congressional approval of state-law counterclaims. Moreover, the power sought by the Commission here would be unusual and would raise troubling constitutional questions.

ment of ordinary debts owed by customers to brokers. Nothing in the 1983 Amendments suggests that Congress had that sort of collection procedure in mind.[9]

Read against this background, the materials cited by petitioners are, at their strongest, inconclusive. As the court of appeals noted, "cryptic" references to counterclaims or broad provisions relating to "any party" are far from "compelling" indications that Congress meant to go as far as petitioners insist. Commission Pet. App. at 42a-43a. Given that a construction limiting jurisdiction to counterclaims under the Act is "also sensible," and given that such a construction does not create novel agency authority over state-law matters, it was entirely appropriate for the court of appeals to decide to read the statute narrowly. Indeed, we think that this would be the proper course regardless of any possible constitutional problems caused by a contrary reading.

It is all the more advisable, however, when those constitutional problems are taken into account. As this Court held in *Crowell v. Benson, supra*: "When the validity of an act of the Congress is drawn in question, and if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that

[9] Where Congress intended to validate a Commission policy, and expand coverage of the Act, it took pains to do so openly. Thus, in the 1978 amendments it amended Section 14(a) of the Act to expand the class of persons against whom a reparations complaint could be filed by substituting the words "who is registered or required to be registered" for the word "registered." Pub. L. 95-405, § 21(1), 92 Stat. 875 (1978). The legislative history commenting on this amendment states that its purpose was "to make it clear that reparations proceedings may be brought against any person who is registered, or who is required to be registered, under the Act * * *. This provision is consistent with the Commission's decision in *Stucki v. American Options Corp.* [citation omitted]." 1978 U.S. Code Cong. & Ad. News 2126.

such a construction is permissible and should be adopted in the instant case." 285 U.S. at 62. This Court has applied the same cardinal principle in many other instances as well. E.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Lynch v. Overholzer*, 369 U.S. 705 (1962); *Ashwander v. TVA*, 297 U.S. 288 (1936).

This case is particularly appropriate for application of this rule. Not only is there a serious constitutional question raised by petitioners' construction of the statute, but that construction provides the Commission with a different (and grander) jurisdictional reach than other agencies enjoy. Thus, to uphold that construction, it is necessary to find both that Congress intended such an expansive grant *and* that it did so in the face of strong constitutional barriers posed by Article III. Nothing in the Act or legislative history speaks with sufficient force to justify that conclusion.

The Commission argues, however, that the authority to adjudicate state-law counterclaims is necessary to preserve the reparations program. As an initial matter, we note that it has offered no statistics or other evidence to support that conclusion. In its present Brief and in its two Petitions for Certiorari in this case, the Commission informed the Court that 8,000 reparations claims have been filed since 1975, but it has never stated how many involved state-law counterclaims. Commission Pet. at 9. However, in its order indicating that it would continue to process counterclaims despite the court of appeals' decision in this case, the Commission specified only sixty cases involving counterclaims docketed from 1980 through the date of the order, September 10, 1984. See *In the Matter of Various Reparations Proceedings in Which Counterclaims Have Been or in the Future are Filed*, 1 Comm. Fut. L. Rep. (CCH) ¶ 22,352. Even if this figure is understated, it nevertheless suggests

that the great majority of reparations cases do not involve state-law counterclaims at all.

Whatever the precise numbers may be, however, the presence or absence of jurisdiction over state-law counterclaims does not greatly change the situation confronting customers trying to decide whether to proceed in reparations, or in court or arbitration. See 17 C.F.R. § 180.1 *et seq.* Even before the decision in this case, brokers could and did file their state law claims in court; they will presumably continue to do so as long as they consider such a course advantageous. In fact, the Commission's own policy, set forth in footnote 15 at page 26 of its Brief, seems to encourage brokers to sue in court for debit balances. According to that footnote, the Commission will stay any case where the broker has previously filed a claim for a debit balance and the claim is pending in a court with a compulsory counterclaim rule. See *Howard v. J. C. Bradford & Company*, [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,393 (1984). Thus, a broker can prevent consideration by the Commission of any reparations claim merely by filing a debit balance claim in a court with a compulsory counterclaim rule. The availability of this preemptive tactic seems to reduce the importance of the reparations program, particularly with respect to debit balance counterclaims.

We also point out that, as matters currently stand, the decision of the Commission to adjudicate state-law counterclaims works to the disadvantage of the customers for whose benefit the reparations program was established. Those customers are now discouraged from using it where there is a possibility of a state common law debit balance counterclaim, not because the broker can file its claim in court, but because, as in this case, the Commission will not permit a state common law defense to be raised to the counterclaim. Nor, apparently, will it permit the petitioner to raise a state-law claim for

damages *against* the broker. Here, Schor and MSA raised both a state common law defense and a state-law claim, without any acknowledgment by the Administrative Law Judge or by the Commission on their Application for Review. See Complainant's Reply Brief, Court of Appeals Record, Appendix 806; Applications for Review, Court of Appeals Record, Appendix 900-902 and 927D-927F.[10] Thus, the jurisdiction asserted by the Commission is, at best, incomplete and, at worst, prejudicial to the principal beneficiaries under the Act.

Finally, petitioners argue that the decision below will lead to imbalances resulting from dual proceedings. This concern, however, is overstated. In many cases, as now, the claims will be heard together in federal court. But, even if two proceedings do go forward separately, the Commission can use its powers to obviate any difficulty resulting from that situation. For example, by exercising its authority to regulate registrants under the Act, it can direct them not to pursue court proceedings for a deficit balance to judgment until pending reparations proceedings are concluded. Or, it can direct registrants to give credit for any reparations awarded against them. And, it can direct that customers give credit on any Commission reparations awards for any state or federal court award on an account deficit.

When all is said and done, the real concern of the government here would seem to be that expressed in its brief on pages 27 and 28. There, we are advised that consideration "is now being given to the possible creation of non-Article III forums for the adjudication of the

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[10] Indeed, in its Supplemental Brief in the Court of Appeals, the Commission expressly disavowed remarks of its counsel at prior oral argument in the following words: "Any suggestion by Commission counsel at oral argument that the Commission has, or necessarily would, entertain non-Act claims asserted by customers in response to non-Act counterclaims was incorrect." Commission Supplemental Brief in the Court of Appeals, p. 18, fn. 14.

multitude of claims that arise in connection with federal programs and that otherwise would have to be litigated, at great expense and burden, in Article III Courts." It is not immediately clear that this plan will be unavoidably sidetracked if agencies are not given power over state-law claims. But, in any event, the Commission does not explain why dispute resolution in Article III courts must always be expensive and burdensome compared to non-Article III forums. There is no necessary cause-and-effect relationship between having a forum presided over by an official who is as independent of outside influence as life tenure and salary protection can make him, and the burden and expense to litigants in that forum. Economy is not prohibited by Article III; a dependent judiciary is. Even within the confines of Article III, Congress can take significant steps to reduce the burdens on the federal courts. See page 43 *infra*.

In short, the Commission need not have a unique jurisdiction over state-law counterclaims in order to carry out its role under the Act. Because its attempt to assume that jurisdiction goes beyond any clear directive from Congress, that attempt should be held to be beyond its statutory authority.

II. Article III Bars A Grant Of Jurisdiction To The Commission To Adjudicate State-Law Claims.

If the Court concludes that Congress intended to grant the Commission jurisdiction over state-law claims, the remaining question is whether that grant of jurisdiction is consistent with Article III of the Constitution.[11]

[11] Article III, § 1 provides that judges of the federal courts established pursuant to that Article "shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Section 2 provides that "[t]he judicial Power shall extend" to certain enumerated classes of cases, including suits "between Citizens of different States."

In our view, it plainly is not. Both the history of Article III and the decision of this Court in *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, *supra*, demonstrate that the federal power over state-law claims—a power that was given only with great apprehension and largely because of the independence of federal judges—cannot be exercised by agencies like the Commission.[12]

A. Congress May Not Depart From the Understanding Inherent in Article III That Federal Judicial Power Over State Law Claims Would Be Exercised By Independent Judges.

a. Although six Justices of this Court indicated in *Northern Pipeline*, *supra*, that assignment of common law claims to alternative tribunals raised special constitutional problems, petitioners appear to treat state and federal claims as essentially fungible for purposes of Article III analysis. In our view, this approach is at odds with both the history of Article III and the teachings of this Court. As Justice Frankfurter has observed, "[i]n the compromise of federal and state interests leading to distribution of jealously guarded judicial power in a federal system . . ., it is obvious that very different considerations apply to cases involving questions of federal law and those turning solely on state law." *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting).

Those different considerations are fully evident in the debates surrounding the adoption of Article III. From the beginning, there was no serious question that the National Government should include a judicial branch. See Hart and Wechsler, *The Federal Courts and the Federal System* 4 (1973 ed.), citing Farrand, The Framing of the Constitution 79 (1913) ("[t]hat there should

[12] As we discuss at pages 38-42 *infra*, these principles cannot be, and have not been, rendered inoperative by "consent" of the parties.

be a national judiciary . . . was readily accepted by all"). Nor was there any extended dispute about the jurisdiction of federal courts over federal laws. See Hart and Wechsler, *supra*, at 13-14. A proposal to extend the federal judicial power to "all cases arising under laws passed by the Legislature of the United States" was, aside from minor changes in wording, "accepted and incorporated into the Constitution without further question or discussion." *Id.* at 14. It aroused no controversy during the process of ratification.[13]

There was no such ready acceptance of federal jurisdiction over state-law claims. Far from being thought a natural part of federal judicial power, "[t]he grant of diversity jurisdiction aroused bitter controversy in the ratification debates . . . ." Hart and Wechsler, *supra*, at 18; see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928). As Justice Frankfurter observed, "[t]he diversity jurisdiction of the federal courts was probably the most tenuously founded and most unwillingly granted of all the heads of federal jurisdiction which Congress was empowered by Article III to confer." *National Mut. Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 650-51 (1949) (dissenting opinion); see also 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3601, at 337-38. This controversy was intensified by the expectation that the federal power would be exercised by inferior courts located throughout the Nation.[14]

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[13] Although this grant of judicial power was essentially uncontested, Congress did not provide lower federal courts with general federal-question jurisdiction for nearly 100 years. See *Palmore v. United States*, *supra*, 411 U.S. at 400-02.

[14] Quite apart from concerns about diversity jurisdiction, opponents of a strong federal judiciary sought to deter the creation of inferior federal courts. See Hart and Wechsler, *supra*, at 21. It is by now well-recognized that Congress has the power, but is not required, to establish such courts. *Palmore v. United States*, *supra*, 411 U.S. at 401.

The strongest objection to giving the federal courts extensive judicial power was that they would preempt or, as a practical matter, absorb the state courts. See Friendly, *supra*, at 487-490. Although such dire predictions proved overblown, they are nonetheless relevant here because of the response that they provoked. Describing what he saw as the proper relationship between federal and state judicial powers, see *The Federalist* No. 82, at 491 (C. Rossiter ed. 1961), Hamilton drew a pointed distinction between cases traditionally within state competence and cases arising out of the authority granted in the new Constitution. Although Article III itself made no distinction between the two classes of cases, Hamilton argued that the former would necessarily be subject to concurrent federal and state jurisdiction while the latter might (but need not) be confined solely to federal courts: "But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases can hardly be considered as the abridgement of a pre-existing authority." *Id.* at 493 (emphasis in original). This approach demonstrates that, from the outset, there was a special sensitivity to the exercise of federal power over claims within the "pre-existing authority" of the state courts.[15]

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[15] The counterclaim at issue in this case, despite its modern overtones, is very much the sort of claim that was within the authority of the state courts 200 years ago. It is, in essence, a claim upon a contract. The right to recover on the contract, if any indeed exists, arises from state law. Whether the suit is timely brought, whether the contract is binding, whether equitable defenses exist, are also issues to be decided by reference to state law. The decision of these issues would be confined to state courts but for the grant of judicial power in Article III.

The proposed grant of federal power, at least to inferior courts, was also met with the more restrained objection that it was unnecessary in light of the established system of state courts. While this argument again applied with some force to federal claims, it took on special weight with regard to suits based solely on state law. As one proponent of this view noted, "justice may be obtained in [state] courts on reasonable terms; they must be more competent to proper decisions on the laws of their respective states, than the federal states can possibly be. I do not, in any point of view, see the need of opening a new jurisdiction in these causes." Lee, *Letters of a Federal Farmer*, Ford Pamphlets on the Constitution, 277, 307 (1888), quoted in Friendly, *supra*, at 491-92. Others noted the obvious fact that state courts had been competently deciding "the common controversies of the people" for many years, an exercise of jurisdiction that did not have to change merely because of the advent of a National Government. See Friendly, *supra*, at 492.

The response to these arguments is once again relevant here. The principal objection to leaving certain cases within exclusive state jurisdiction was a perceived lack of independence on the part of state judges. With regard to federal cases, Hamilton observed: "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist* No. 81, at 481, 486. The concern with regard to diversity cases was even more severe, though for a more narrowly defined reason: the fear that judges would be beholden to local interests. As Hamilton stated, "[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens." *Id.* No. 80, at 475, 478.

The concern that state judges might be subject to political influence was hardly fanciful. As one commentator has noted, "[t]he method of appointment and the tenure of the [state] judges were not of the sort to invite confidence." *Id.* at 497. In many states, the judges were removable by action of the legislative or executive branch without any guaranteed length of service. *Id.* In other states, the judges were subject to election by popular vote. Protections against reductions in salary while on the bench were also inadequate. See *The Federalist* No. 79, at 472.

The federal judges authorized in Article III, by contrast, were to be given both life tenure and a minimum salary immune from reduction during their service. These provisions were meant to serve at least two purposes. Most importantly, they were intended to make federal judges free from political and other pressures. As Hamilton argued in *The Federalist* No. 78, at 470-471, "[t]hat inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission." In the following paper, he stated that, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Id.* No. 79, at 472.

The independence of the federal judges was not sought as an end in itself, but as a means to "secure a steady, upright, and impartial administration of the laws." *Id.* No. 78, at 465. Whereas judges subject to removal by the legislature or by popular vote might interpret the law with an eye to political approval, it was envisioned that federal judges would consult nothing but "the Constitution and the laws" themselves. *Id.* No. 78, at 471. This strict adherence to law, in turn, would provide assurance of a fair resolution "in cases in which the

State tribunals cannot be supposed to be impartial . . . ." *Id.* No. 80, at 478.

The provisions for tenure and fixed minimum salary had a second aim as well: to attract more competent judges. *Id.* No. 78, at 471-72. Hamilton observed that, "[t]o avoid an arbitrary discretion in the courts," it was important that federal judges "be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . ." *Id.* No. 78, at 471. Knowledge of those rules and precedents, however, would require long study by judges of exceptional ability. Without the incentives and protections offered by guaranteed tenure and salary, it was predicted that "the administration of justice [would be thrown] into hands less able, and less well qualified to conduct it with utility and dignity." *Id.* at 471-72.

In the end, these considerations prevailed over concerns that the federal courts would make needlessly great inroads on the work of the state courts.[16] With regard to diversity claims in particular, the drafters concluded that a grant of judicial power to federal courts was necessary to alleviate worries about biased or inadequate state courts.[17] In that limited class of cases, they accepted the unusual proposition that federal courts could

[16] The grant of power in Article III is, of course, limited to cases involving citizens of different states. See Art. III, Sec. 2. The jurisdiction asserted by the Commission is far broader, reaching to suits between citizens of the same state as well.

[17] As Chief Justice Marshall put it not many years later: "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 87 (1809).

administer state law *more* reliably than state courts because of their greater competence and independence from political influence.

These justifications for federal power over state-law claims have little or no relevance to alternative tribunals like the Commission. It is conceded by all parties that members of the Commission have neither life tenure nor an irreducible salary. As provided by statute, they are appointed for a term of five years. At the end of that term, reappointment depends upon, first, the pleasure of the President (who must appoint) and, second, the consent of the Senate (which must confirm). In fact, the political affiliations of the commissioners play a role in the selection process because Congress has provided that "[n]ot more than three of the members of the Commission shall be members of the same political party." 7 U.S.C. § 4a. The Act provides no assurance against a reduction in salary during service. In short, members of the Commission have none of the guarantees of independence that are contemplated by Article III.

This lack of independence cannot be taken lightly. While we do not, of course, contend that any member of the Commission is actually biased in a particular case, the fact remains that they are subject to political pressure not faced by Article III judges. Thus, for example, an official seeking reappointment to another five-year term may be sensitive to criticism from an influential legislator whose constituents have been adversely affected by the decisions of the tribunal. Indeed, particular litigants or organizations, dissatisfied with such decisions, may lobby against reappointment on the ground that the official is too pro-industry or too pro-customer. Also, given the requirement that the Commission include persons having knowledge of futures trading and "the production, merchandising, processing or distribution" of commodities, 7 U.S.C. § 4a, other individuals or groups may press for the appointment of commissioners from a

different segment of the industry. The outcome of these efforts may well affect the outcome of state-law claims brought before the Commission.[18]

We also note that the commissioners, who need not be (and generally are not) lawyers, are unlikely to have any familiarity with the law of a particular state. While the initial decision in a suit before the Commission is rendered by an administrative law judge, the Commission has the statutory authority to revise it upon appeal. In reviewing a state-law claim, therefore, the commissioners are ultimately in the position of applying to the facts a body of law with which they can have, at most, a passing acquaintance. The possibility of erroneous judgments—or, for that matter, judgments based more on beliefs about the commodities industry than on knowledge of the governing law—is thus unavoidably increased.[19]

We think that these differences between the Commission and the regular federal courts are of constitutional significance. As the existence of Sections 1 and 2 together make clear, Article III is concerned not just with the fact of federal judicial power, but with the way in which it is exercised. Here, federal officials have assumed a power over state claims relinquished only most narrowly and reluctantly in Article III itself; yet, they

[18] It is true, of course, that members of the Commission are not subject to any particular influence by *state* legislators and voters. But that fact does not mean that the expectations of Article III have been satisfied. Nothing in the history of Article III suggests that the drafters of that provision intended to provide a choice between state judges possibly beholden to state officials and federal judges possibly beholden to federal officials. Indeed, in light of the concerns about federal judicial power in general, it seems likely that the possible influence of federal officials on state-law cases would have been viewed with even greater alarm.

[19] As we discuss later in this brief, the availability of an appeal to an Article III court does not cure this defect. See pages 37-38 *infra*.

have done so without having any of the qualities of independence and legal expertise that justified the grant of power in the first place. That diversion of the federal power over state-law claims is an affront to the principles embodied in Article III.

b. A proper respect for the limited reach of Article III over state-law claims is not an anachronism. To the contrary, this Court has expressed repeated concern about efforts to expand that jurisdiction at the expense of state interests.

The most pertinent example, of course, is the decision in *Northern Pipeline*, *supra*. There, a plurality of four Justices made clear that the power of Congress to create tribunals outside the scope of Article III was confined to three particular categories: territorial courts; tribunals for courts-martial; and tribunals to adjudicate "public rights." 458 U.S. at 63-77. The plurality noted that the recognition of this power "represent[ed] no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts." *Id.* at 64. Rather, it took account of narrow situations "in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." *Id.* The plurality concluded that "the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case," did not fall within any of those narrow situations. *Id.* at 71.

Justices Rehnquist and O'Connor, concurring in the judgment, also found the state-law nature of the claim to be significant. Noting that the claim involved matters that were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *id.* at

90, the concurring Justices pointed out that "[t]here is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of [the plaintiff] arise entirely under state law." *Id.* Given the character of the claims, the concurring Justices found no need to review the prior Article III cases in full detail, observing that "[n]one of the cases ha[d] gone so far as to sanction the type of adjudication to which [the defendant] will be subjected against its will" under the congressional plan. *Id.* at 91.[20]

The same considerations should be controlling here. The counterclaim asserted by petitioner Conti arises "entirely under state law" and must be decided without benefit of any "federal rule of decision." By definition, there is nothing "exceptional" about the power of the Congress over that sort of contract claim: the notable thing about congressional power over state law is that it is largely nonexistent.[21] If the proper focus of inquiry is the power over commodities trading, that power seems even less exceptional than the power over bankruptcies at issue in *Northern Pipeline*—a power that is at least expressly mentioned in Article I. Although Congress may find it more convenient for the Commission to decide all claims having anything to do with commodities trading, the Court in *Northern Pipeline* correctly rejected arguments based upon mere convenience. As the plurality stated, the principles of Article III must be applied "in

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[20] As we discuss below, see pages 38-42 *infra*, we do not believe that consent of the litigants is sufficient to alter the principles established in Article III. Even if it is, however, we think that respondent in this case was subjected to the jurisdiction of the Commission over the counterclaim "against [his] will."

[21] In proper circumstances, of course, Congress can preempt state law. The existence of that power does not mean, however, that Congress can treat state law rights as if they were federal rights for purposes of assigning disputes to particular tribunals. See pages 36-37 *infra*.

light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole." *Id.* at 64.

The *Northern Pipeline* case is the only decision of this Court directly addressing the power of Congress to give alternative tribunals jurisdiction over state-law claims. But, in *Glidden Co.* v. *Zdanok*, *supra*, at least several members of the Court gave implicit recognition to the idea that state-law claims had to be heard by Article III judges. There, Justice Harlan for a plurality of the Court found it necessary to decide whether a judge of the Court of Claims, sitting by designation on the Court of Appeals for the Second Circuit, was an Article III judge. In explaining the need for such an inquiry, he observed that "[t]he Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants." 370 U.S. at 537. Noting that "[a]uthority for the Federal Government to decide questions of state law exists only by virtue of the Diversity Clause in Article III," Justice Harlan concluded that "[f]or this reason, the question whether Judge Madden enjoyed constitutional independence is inescapably presented." *Id.* at 537-538.[22]

Other cases, while less directly on point, have also treated federal power over state claims with great restraint. Starting with the propositions that the federal courts are courts of limited jurisdiction, and that certain limits are set as a constitutional matter by Article III, this Court has frequently made clear that even powers concededly given to the federal courts should be regarded as relatively inelastic. From early cases construing the extent of diversity jurisdiction (*Strawbridge* v. *Curtiss*, 3 Cranch (7 U.S.) 267 (1806)) to recent cases marking

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[22] Although Justice Harlan wrote only for himself and Justices Stewart and Brennan, no member of the Court disagreed with this portion of the plurality opinion.

out the limits of ancillary jurisdiction (*Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978)), the Court has returned to the general principle that "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Id.* at 374.

Although these cases have commonly involved issues regarding the extent of the judicial power, rather than the form in which the power is exercised, they are nevertheless instructive about the delicate balance between state and federal interests that Article III represents. For example, this Court established almost immediately that a case brought on diversity grounds is presumptively outside federal jurisdiction unless a contrary showing is made. See *Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 7, 11 (1799). In early diversity cases, the Court applied that presumption vigorously, declining to find jurisdiction (even when it apparently existed) without a proper allegation of diversity in the pleadings. See *Hodgson* v. *Bowerbank*, 5 Cranch (9 U.S.) 303 (1809). The Court also construed statutory grants of jurisdiction narrowly, holding that complete diversity between plaintiffs and defendants was required, *Strawbridge* v. *Curtiss*, *supra*, and that citizens of the territories and District of Columbia were not citizens of a state for purposes of diversity. *Hepburn & Dundas* v. *Ellzey*, 2 Cranch (6 U.S.) 445 (1805); *Corporation of New Orleans* v. *Winter*, 1 Wheat. (14 U.S.) 91 (1816).[23] As the Court remarked in a later case, "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934).

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[23] The strict holdings in these cases were somewhat modified by later statutes and cases. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, *supra*; *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

This due regard for state interests has, with narrow exceptions, taken precedence over notions of ease and convenience. Thus, in *City of Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941), the Court found that the federal diversity statute required the realignment of parties to the case even though the effect of the realignment was to defeat jurisdiction. The Court emphasized the limited nature of federal jurisdiction over state-law cases, stating: "[t]he power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (article 3)." *Id.* at 76-77, quoting *Healy* v. *Ratta*, *supra*, 292 U.S. at 270. More recently, in *Aldinger* v. *Howard*, 427 U.S. 1 (1976), the Court declined to allow a plaintiff, having filed a federal suit against one defendant, "to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction." *Id.* at 14. The Court noted that a different rule, even if fashioned in the interests of judicial economy, "would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." *Id.* at 15. See also *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100 (1981); *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984).[24]

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[24] Even when the Court has extended jurisdiction, it has cautioned against a wholesale departure from these principles. Thus, for example, while allowing the federal courts to exercise pendent jurisdiction, the Court has advised that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Petitioners correctly note that the federal courts, without violating Article III, can decide compulsory counterclaims otherwise

Perhaps the most thorough discussion of the inhibitions on federal power took place in the various opinions in *National Mut. Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, where six Justices concluded that Congress could not expand the jurisdiction of the federal courts beyond the limits expressly set out in Article III. Although the plurality opinion of Justice Jackson took the position that Congress could enlarge the jurisdiction of Article III courts by use of its powers under Article I, Justice Rutledge stated: "The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded." *Id.* at 605 (opinion concurring in the judgment).[25] Justice Frankfurter agreed, noting that "[b]ut for Article III, the judicial enforcement of rights which only a State, not the United States, creates would be confined to State courts." 337 U.S. at 650 (dissenting opinion). He admonished that a tolerance for expansion of federal jurisdiction would be inconsistent with the "Constitutional scheme for the establishment of the federal judiciary and the distribution of jurisdiction among its tribunals so carefully formulated in Article III . . . ." *Id.* at 651.[26] Justice Vinson, while in accord with Justices Rutledge and Frankfurter on this point, wrote to express his view that there were

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outside their jurisdiction. But the clear purpose of that rule is to allow more effective exercise of the jurisdiction conferred on Article III tribunals. What petitioners seek here is the opposite: to expand the jurisdiction of a tribunal lying beyond the scope of Article III. To apply the same rule in that context would not advance the interests of Article III, but retard them.

[25] A majority of the Court concluded that citizens of the District of Columbia could sue and be sued in federal court as part of the diversity jurisdiction. It was able to reach that conclusion, however, only because two Justices believed that Article III did not exclude citizens of the District of Columbia from that jurisdiction. The Court, therefore, found jurisdiction by a combination of theories, each of which was rejected by a majority of the Court.

[26] See also Frankfurter, *Distribution of Judicial Power Between State and Federal Courts*, 13 Cornell L. Q. 499 (1928).

"two entirely different principles embodied in Art. III": first, the principle that "the three branches of government established by the Constitution are of coordinate rank" and, second, the principle, "[o]f equal importance," that "the Constitution contains a[n express] grant of power by the states to the federal government, and that all powers not specifically granted were reserved to the states or to the people." *Id.* at 628 (dissenting opinion). Justice Vinson then suggested that the second principle, in particular, argued in favor of a strict adherence to the limits on the judicial power established by Article III. *Id.* at 631-38.

Finally, we note that the Court has made the same basic point in deciding, not whether federal power exists, but how it should be exercised. The most prominent example, of course, is the decision in *Erie Railroad Co.* v. *Tomkins*, 304 U.S. 64 (1938), rejecting the authority of the federal courts to create federal common law and overruling *Swift* v. *Tyson*, 16 Pet. (41 U.S.) 1 (1842). The decision in *Erie* rested, at bottom, upon a frank recognition that the interference of federal courts in matters of state law should be severely limited. The Court made clear that the states, not Congress, possessed the basic authority "to declare substantive rules of common law applicable in a state whether they be local in nature or 'general,' be they commercial law or a part of the law of torts." 304 U.S. at 78. In light of that restriction on the federal Legislature, it followed that the federal courts had no inherent power to divine and declare common law applicable in the several states. That understanding, as the Court later observed, "touches vitally the proper distribution of judicial power between state and federal courts." *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109 (1945).

The common principle among these varied cases is one of respect for the limits of Article III where state claims are concerned. As we have said, it would be a sharp

departure from those limits to allow non-Article III judges, having less tenure and salary protection than many state judges, to assume power over state claims for the sake of convenience. The Court in *Northern Pipeline* correctly declined to allow such a departure, and it should decline to allow it here.

B. Petitioners Have Not Advanced a Legitimate Basis for Giving Jurisdiction Over State-Law Claims to Judges Unprotected By the Provisions of Article III.

a. In defending the jurisdiction of the Commission over state-law counterclaims, petitioners contend that decisions of this Court allowing the creation of "legislative courts" should be followed in this case. There are several problems with this argument. First, as we have already noted, the case most closely in point (*Northern Pipeline*) reaches the opposite result from that urged by petitioners. Second, as we discuss in the following pages, the cases involving federal rights, whether public or private, do not trigger the same concerns about federalism as cases involving rights arising under state law.

This Court has stated that "[a]ll constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); see, e.g., *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272 (1856); *Thomas, supra.*[27] This power does not turn, as such, on whether the right is denominated as "public" or "private." Where the federal right is asserted against

[27] The Court has also held that, "[a]t least in cases in which 'public rights' are being litigated," Congress has greater power to require factfinding without a jury. *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 450 (1977). Respondent argued before the Commission that its assumption of jurisdiction over the counterclaim denied him his right to a trial by jury on that claim. In view of its disposition of the case, the court of appeals did not reach that question. Commission Pet. App. at 19a n.14.

the federal government itself, the Court has taken account of the traditional immunity of the government from such suits, remarking that citizens have no right to sue at all "unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them." *Ex Parte Bakelite Corporation*, 279 U.S 438, 452 (1929). But, even where the rights provided by Congress concern the relationship of one private party with another, and thus raise no question of sovereign immunity, the Court has held that Congress can place their enforcement within the authority of tribunals lacking the characteristics set forth in Article III. See *Thomas supra; Crowell* v. *Benson, supra.*

The power to confer non-Article III jurisdiction over *some* private rights, however, is not the same as power to confer it over *all* private rights. Where federal rights are at issue, as Hamilton recognized in *The Federalist* (see page 19 *supra*), there is no question of displacing preexisting authority in the state courts for the simple reason that no previous federal rights existed. In those cases, therefore, the only real concern under Article III is to maintain a proper regard for the separation of powers. On the one hand, the Court has to assure that Congress does not go too far in immunizing its programs from review by the Judicial Branch; on the other hand, it must take care not to intrude the judicial power into areas generally confided by the Constitution to the other branches. In striking that balance, the Court has recognized that "when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas, supra*, at 337.[28]

[28] The concerns about federalism are also absent from cases in which this Court has acknowledged the power of Congress to

The balance at stake with regard to state-law matters is necessarily very different. In such cases, as here, the central issue is not whether Congress has trespassed upon the judicial powers of the federal government; it is whether Congress has invaded the prerogatives of state governments. As we see it, those prerogatives include the right to have the federal judicial power over state claims exercised, if at all, only in accordance with the limits of Article III. Put another way, the drafters of Article III contemplated that state rights would be adjudicated either by state courts or, in limited circumstances, by federal courts subject to its provisions. Any variation in that structure affects not just the relationship among the branches of the federal government, but the relationship between the federal and state governments as well.

These different considerations, in turn, go directly to the place of a non-Article III tribunal in the constitutional framework. In the first place, the fact that Congress need not create a particular federal right at all creates a natural breathing space for conditions, including procedural conditions, attached to the right. Furthermore, when Congress uses its legislative power to create a right, and provides for a tribunal to adjudicate disputes involving that right, it may be presumed to understand the interplay between the right and the procedure for enforcing it. Congress is thus in a position to assess for itself whether the possibilities of political influence on non-tenured officials, or their lack of legal

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create special territorial courts, military courts, and courts for the District of Columbia. See, e.g., *Palmore v. United States, supra*; *American Insurance Co. v. Canter*, 1 Pet. (26 U.S.) 511 (1828); *Kendall v. United States*, 12 Pet. (37 U.S.) 524 (1838); *Dynes v. Hoover*, 20 How. (61 U.S.) 65 (1857). In the District of Columbia and in the territories, Congress acts in effect as both the federal and the state government. In such circumstances, the exercise of federal power does not effect a simultaneous withdrawal of power from the states.

training, place the substantive right at risk. If the process proves flawed, Congress can make whatever adjustments are necessary in either substance or procedure to assure that its program is carried out as intended. Thus, where a legislative body creates a right linked to a specified procedure for enforcing it, there are strong reasons for deferring to its judgment in the absence of clear constitutional prohibitions.

These principles cut the opposite way when the power over the right and the power over the procedure lie in different hands. The proper concern in that situation must be to assure that the procedure fashioned by one sovereign does not alter the right fashioned by another. We believe that, at least since *Erie*, such assurance is present when Article III courts decide state-law claims. But we have no similar confidence when the decision is made by temporary officials, drawn from a particular industry and chosen without regard to legal training. At that point, the likelihood of a sure-footed application of state law is sufficiently uncertain to require strict adherence to the structure envisioned by Article III.

The failure to distinguish among the distinctive interests underlying Article III greatly undercuts petitioners' reliance on cases like *Crowell* v. *Benson, supra*, and *Thomas*. In *Crowell*, it is clear that, while the dispute was between private parties, the right at issue was solely one created by Congress. The Court specifically noted that '[t]he act itself, where it applies, establishes the measure of the employer's liability . . .' and that any factual determinations were to be made "in accordance with the prescribed standards." *Id.* at 54.[29] In *Thomas*, the Court expressly considered and rejected

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[29] Indeed, to assure that the tribunal in that case decided facts only in cases involving rights legitimately derived from Congress, the Court required an Article III court to undertake a more searching review of those facts deemed "a condition precedent to the operation of the statutory scheme." *Id.* at 54-55.

an argument that the matter for decision in the alternative tribunal was one arising under state law. *Id.* at 3335-36. The Court pointed out that "[a]ny right to compensation . . . results from [the federal statute] and does not depend on or replace a right to such compensation under state law." *Id.* at 3335. In addition, the Court noted that "federal law supplies the rule of decision." *Id.* Thus, neither *Crowell* nor *Thomas* posed any question of interference with rights arising from, and determined by, state law.

Petitioners suggest, however, that Congress could make the subject of the counterclaim here into a "federal" or "public" right if it so desired. The point seems to be that, by conferring jurisdiction on a non-article III tribunal, Congress has actually taken a less restrictive course than it would have done by federalizing the law. This argument, of course, depends on the dubious assumption that the authority to do something and the political support to do it are one and the same. But, quite apart from whether Congress can or cannot actually change state law, it is an odd doctrine that would allow Congress to exercise a power it does not have in order to avoid use of one it has. Integral to the Constitution as a whole is the idea that the branches of government act in certain ways and only certain ways. See *INS* v. *Chadha*, 462 U.S. 919 (1983). As the Court made plain in *Chadha*, the Framers intended that "the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951. It is thus one thing for Congress to modify rights under state law openly through the political process; it is quite another for Congress to make them subject to random and inadvertent change through the decisions of a tribunal not invested with Article III protections. See generally, *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 537 (1958) (nature of tribunal may "bear significantly upon achievement of uniform enforcement of [a] right"). Indeed, if

Article III places fewer restrictions on the tribunals chosen to adjudicate federal rights, it is at least in part because Congress has enacted those rights through exercise of its legislative power. The same rule should not apply when Congress has enacted the procedure without the substance.

Petitioners also make a point of noting that a losing party before the Commission has a right of appeal to an Article III court. If this fact is meant to suggest that the Commission can be treated as an "adjunct" to an Article III court, similar to a magistrate or special master, the suggestion is unpersuasive. The federal courts have no role in establishing or supervising the Commission, which functions solely according to a grant of authority from Congress. Viewed objectively, the Commission is nothing more or less than a separate adjudicatory body, asserting jurisdiction over both federal and state claims, whose decisions are subject to review and enforcement in Article III courts. That modest contact with the traditional exercise of federal power hardly transforms the Commission into a part of the structure contemplated by Article III.

If petitioners instead intend to suggest that a right of appeal to an Article III court cures the ills of an initial proceeding before the Commission, that suggestion is equally unpersuasive. In the first place, the plurality opinion in *Northern Pipeline* dismissed the same argument in strong terms, noting: "Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level." 458 U.S. at 86 n.39. In any event, however, the right of appeal from the Commission hardly leaves a litigant in a position comparable to that of one proceeding initially

in an Article III court. The statute provides that entry into federal court depends upon the posting of a sizeable bond in satisfaction of the judgment rendered by the Commission. 7 U.S.C. § 18(e). Moreover, the appealing party must overcome a balance tilted in favor of his opponent by virtue of the Commission proceedings. Appellate review, at best, is an incomplete remedy for the primary exercise of jurisdiction by a non-Article III tribunal like the Commission.

b. Petitioners also contend that the Commission was entitled to exercise jurisdiction over the state-law counterclaim in this case because respondent consented to that jurisdiction. In our view, this argument is incorrect for two reasons. First, the consent of litigants is not enough to override the judicial structure contemplated by Article III. Second, respondent did not, in fact, consent to adjudication of the counterclaim by the Commission.

Although the Commission treats the issue here as involving only a "personal right" that can be waived, Commission Br. at 33, that analysis trivializes the purpose of Article III. As the history of Article III quite clearly shows, the intent of the drafters was to establish an independent federal judiciary and to confer upon it the power to decide certain narrowly defined classes of cases and controversies. See pages 17-23 *supra*. That intent had to be carried out against a background of fears that the judiciary would usurp powers both of the state courts and of the coordinate branches of the federal government. Thus, the federal judicial power was given and withheld for reasons that implicate the proper balance of power between and among governments and their branches. That balance is important for reasons that have nothing to do with the wishes of the litigants in any particular case.

The well-recognized rule is that "the parties cannot waive lack of jurisdiction by express consent, or by con-

duct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 Wright & Miller & Cooper, *Federal Practice and Procedure* § 3522, at 66-68 (1984). Following this reasoning, the Court in *Glidden Co.* v. *Zdanok*, *supra*, declined to find a waiver of the right to raise challenges to jurisdiction based upon Article III.[30] The plurality opinion of Justice Harlan (with no dissent on this issue) indicated that the Court would not find waiver "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business . . . ." *Id.* at 535-36. The opinion then pointed out that this principle applied with even greater force "when the challenge is based upon nonfrivolous constitutional grounds." *Id.* at 536. Justice Harlan conceded that the rule was a disruption to the normal appellate process but concluded: "[T]hat is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers. So this Court has concluded on an analogous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court." *Id.* at 536-37. See also *Mansfield, C & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379 (1884).

The inability of the litigants to ignore limitations embodied in Article III does not mean that they cannot consent to less formal procedures within and without Article III. It may well be, as numerous courts of appeals have

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[30] In *Glidden*, the litigants in two cases had failed to present an Article III challenge to certain judges on their appellate panels, sitting by designation from the Court of Customs and Patent Appeals and the Court of Claims, until after they received an unfavorable decision on the merits. 370 U.S. at 535.

found, that litigants can consent to the use of magistrates employed by Article III judges as an aid to their own jurisdiction. See, e.g., *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983). Moreover, litigants may agree to have their disputes resolved outside of the judicial process altogether, by arbitrators or other decisionmakers. Nothing in the history or structure of Article III indicates that resort to these sorts of alternatives is necessarily inconsistent with the expectations underlying the grant of federal power. But it is very different when Congress establishes a separate tribunal, with officials chosen and approved by the Legislative and Executive Branches, and gives that tribunal power over state-law claims without the independence of tenure and salary protection. The consent of the litigants does not make that departure from the constitutional design permissible.

Even if consent were enough, however, it does not exist here. Although respondent did bring his own claim before the Commission, he opposed the assertion of jurisdiction over the counterclaim. Commission Pet. App. at 37a. Moreover, unlike the situation before the Court in *Glidden Co.* v. *Zdanok*, *supra*, he did so before any decision on the merits of that counterclaim was made. He has maintained that position in the court of appeals and now before this Court.

It is a curious use of language to call this express and determined resistance by the term "consent." Indeed, it is hard to see just what respondent could have done to make his objection to jurisdiction more clear. While it is true that filing his claim elsewhere would have avoided the question entirely, it hardly follows that respondent by not doing so agreed to something with which he explicitly disagreed.[31] Thus, if consent means a voluntary acceptance of jurisdiction over the counterclaim, respondent did not give his consent in this case.

[31] The court of appeals exhibited a serious doubt about the power of Congress to condition access to the Commission for federal claims on waiver of Article III protections for state claims. In other settings, the Court has struck down the enforced linkage of a government benefit and the surrender of a constitutional right. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972); *Branti v. Finkel*, 445 U.S. 507 (1980). The court of appeals, noting that Commission rules put respondent to an all-or-nothing choice, was unable to find "the carefully guarded, cost-free consent the Ninth Circuit declared 'essential to the constitutionality of the [Magistrates] Act." Commission Pet. App. at 38a-39a, quoting *Pacemaker Diagnostic Clinic of America, Inc. v. Intromedix, Inc.*, 725 F.2d 537, 546 (9th Cir. 1984) (en banc).

Realistically viewed, petitioners' argument is really not about consent at all, but about involuntary waiver or, perhaps, estoppel. But it is even less fitting to allow departures from Article III based upon waiver than it is upon consent. The theory of consent, at a minimum, has the virtue of allowing to the parties the decisionmaker that they willingly sought and accepted. But the idea of waiver (as advanced here) forces upon one party the decisionmaker that, with regard to the claim at issue, he vigorously opposed. Whatever stretching of Article III is thought necessary to accommodate truly voluntary agreements about jurisdiction, that flexibility should not be extended to cases in which jurisdiction is asserted against the will of one party.[32]

[32] This case would be a particularly inappropriate one in which to find waiver based upon the filing of respondent's own claim before the Commission. At the time that respondent filed the claim in 1980, it was unsettled whether customers had a private right of action under the Commodity Exchange Act. Although this Court recognized such a right in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), the opinions in that case (decided two years later) make clear how open to question the existence of that right was. Had respondent chosen to proceed to federal court, therefore, he would have faced a significant risk that his claim ultimately would have been barred on the ground that the Commission had exclusive jurisdiction.

This analysis does not leave litigants in a position to have their cake and eat it too. Congress can provide that, where a state-law counterclaim is present, the Commission should decline to exercise its jurisdiction over the entire case. Indeed, that is precisely the course now followed by the Commission whenever the counterclaim has already been asserted in federal court. In such cases, as the Commission notes in its brief (at 26 n.15), the Commission will not proceed upon a reparations complaint filed against a broker who has a pending counterclaim in federal court. Thus, the role of Article III courts in cases involving state-law claims can be preserved by extension of an existing Commission practice.

c. A decent regard for the principles of Article III will not, as petitioners foretell, prove an impossible burden for the federal courts. Their policy arguments based on convenience, therefore, even if they are properly part of Article III analysis, are considerably overwrought.

We note, at the outset, that Congress did not intend to commit all actions arising under the statute to the Commission. Quite apart from the presence or absence of state-law counterclaims, it did not bar litigants from bringing their claims to federal court. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, *supra*. Moreover, as just discussed, the Commission defers to the jurisdiction of the federal courts whenever a counterclaim is already pending there. It is thus apparent that either a customer or a broker can bypass the Commission, as matters now stand, without defeating the congressional scheme.

Although petitioners stress that the Commission provides a quicker, more efficient, and less costly method of adjudication than do Article III courts, there is less to that point than meets the eye. Taken at face value, it is really a complaint that, in setting out the plan for federal courts, the drafters of Article III chose a structure that is slower, less efficient, and more costly than petitioners find expedient. Even if that were true, it would

not provide grounds for disregarding that choice. But, in fact, it is not true: the minimal requirements of Article III leave ample room for congressional action that will reduce the burdens faced by the federal courts.

This action can take any number of forms. To begin begin with, Congress can modify the existing jurisdiction of the federal courts by, for example, placing greater reliance on alternative forums for cases involving only federal rights,[33] or by diminishing or withdrawing the jurisdiction of federal courts in diversity cases. Or Congress can adopt less formal procedures for certain types of cases in the federal courts; nothing in Article III requires that every case be pursued according to the Federal Rules of Civil Procedure. Finally, Congress can grant tenure and salary protection to officials on the Commission and similar adjudicatory bodies, assuring them the independence called for in Article III without altering the procedures already in place for cases brought before them. Whether or not these choices are desirable as a matter of policy, they do not involve a departure from the limitations imposed by Article III.

There are many things that Congress can do to address the problem of overcrowded federal courts. What Congress cannot do, and what is at issue in this case, is to put state-law claims within the jurisdiction of officials without the independence assured by tenure and salary protection. That alteration in the use of federal judicial

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[33] There is thus considerable doubt that limiting the power of non-Article III courts over state-law claims would frustrate efforts to relieve the federal courts, as petitioners contend. At the same time, it should be recognized that the widespread creation of non-Article III courts is not an unmixed blessing. As the history of Article III shows, the plan incorporated into that Article represented a balance of complex and important governmental interests, dividing powers among competing sovereigns and among parts of the same sovereign. Those interests will not necessarily be served so well by tribunals that offer convenience but lack the stature and independence of the traditional federal courts.

power exceeds the limits set, after much controversy, in the provisions of Article III nearly 200 years ago.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Nos. 85-621 and 85-642

In the

Supreme Court of the United States

OCTOBER TERM, 1985

COMMODITY FUTURES TRADING COMMISSION,
Petitioner,

v.

WILLIAM T. SCHOR, et al.,
Respondents.

CONTICOMMODITY SERVICES, INC.,
Petitioner,

v.

WILLIAM T. SCHOR, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR CONTICOMMODITY SERVICES, INC.

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REPLY BRIEF FOR CONTICOMMODITY SERVICES, INC.

Respondents repeatedly argue that the jurisdiction of the Commission over state law claims is highly unusual, if not unique (see, e.g., Respondents' Br. pp. 7, 13, 16). Of course, that a legislative process may be unique does not make that process inherently suspect, any more than that a process is pervasive renders it immune from constitutional inquiry. Respondents nevertheless suggest that the absence of citation to a similar statutory scheme requires a higher degree of analysis of Congressional intent than might otherwise be necessary to conclude that Congress meant what it said when it observed that "the reparations program seeks to pass upon the whole controversy surrounding each claim, including

counterclaims arising out of the same set of facts. . . ." H.R. Rep. No. 565, 97th Cong. 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904.

Respondents, however, are mistaken. The Commission's reparations jurisdiction is not unique.

A. *The Contract Disputes Act of 1978 Creates A Non-Article III Tribunal Similar to Commission Reparations With Jurisdiction Over State Law Claims.*

In 1978, Congress passed Public Law 95-563, the Contract Disputes Act of 1978, 41 U.S.C. § 601, *et seq.*, (the "Contract Disputes Act"). The Contract Disputes Act empowers federal agencies to create boards of contract appeals with "jurisdiction over all disputes arising in connection with an executed contract, including breach of contract claims." S. Rep. No. 95-1118, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235, 5236. Pursuant to this congressional grant of authority, numerous boards have been created to hear and decide contract and breach of contract claims, all of which are traditional state law actions. See, e.g., *Guy Roberts Lumber Co.* v. *U.S.*, 5 Cl. Ct. 42 (1984) (Department of Agriculture); *William F. Klingensmith, Inc.* v. *U.S.*, 731 F.2d 805 (Fed. Cir. 1984) (General Services Administration); *U.S.* v. *W.H. Moseley Co.*, 730 F.2d 1472 (Fed. Cir. 1984) (Armed Services Board of Contract Appeals); *Nab-Lord Assoc.* v. *U.S.*, 682 F.2d 940 (Ct. Cl. 1982) (Postal Service); *Coastal Corp.* v. *U.S.*, 713 F.2d 728 (Fed. Cir. 1983) (Department of Energy); *Opalack* v. *U.S.*, 5 Cl. Ct. 349 (1984) (Department of Labor); 41 U.S.C. § 602(b) (Tennessee Valley Authority).

The various boards of contract appeals are clearly not Article III tribunals, and just as clearly determine state law, contract issues as their day-to-day routines. The Contract Disputes Act passes Constitutional muster in exactly the same way as does the Commodity Exchange Act (the "Act") by virtue of the implied consent of litigants who invoke the jurisdiction of these non-Article III bodies.

B. *The Contract Disputes Act, Like The Act Here, Operates With Litigant Consent.*

The validity of the boards of contract appeals cannot be sustained by the fact that the government is invariably a party to litigation before the boards. In these proceedings the government is present in its proprietary, not sovereign, capacity, and has no greater rights than a private litigant:

> [T]he Government subjects itself to judicial scrutiny when it enters the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party.

S. Rep. No. 95-1118, 95th Cong., 2d Sess. 12 (1978), *reprinted in* U.S. Code Cong. & Ad. News 5235, 5246.

The Congressional grant of authority in the Contract Disputes Act is justified for exactly the same reason as under the Act, by the operation of consent. Under the Act, a commodities litigant consents to the assertion of contract counterclaims by electing to pursue a remedy in reparations.[1] Under the Contract Disputes Act, a contract litigant brings his own contract claims and consents to the assertion of contract counterclaims by electing to pursue a remedy before a board of contract appeals.[2] In each case, consent to jurisdiction is implied by the voluntary election of a forum not vested with Article III attributes.

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[1] In this case, Schor did more than impliedly consent by electing to proceed in reparations. Schor affirmatively demanded that Conti dismiss its court action and assert its claims in reparations.

[2] Originally, the Contract Disputes Act was similar to the Act in that it provided a litigant with a choice between proceeding in a non-Article III forum, the board, or in an Article III court, the Court of Claims. In 1982, the Contract Disputes Act was one of numerous statutes amended by the sweep of the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 25 (1982). Under the amendment, a litigant has an election of remedies between two non-Article III bodies, a board or the newly created

(footnote continued on next page)

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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(footnote continued from preceding page)

Claims Court. The legislative history does not address the impact of this amendment under an Article III analysis. There remains, of course, implied consent to non-Article III resolution of contract claim by and against the government in that a party need not contract with the government in the first place. In any event, the validity of the Contract Disputes Act as amended by the Courts Improvement Act is not in issue here.

FOR ARGUMENT

Nos. 85-621 and 85-642

In the Supreme Court of the United States

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COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

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CONTICOMMODITY SERVICES, INC., PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

In our opening brief, we demonstrated that the Commodity Futures Trading Commission (CFTC) is authorized to adjudicate, subject to judicial review, state law counterclaims and that such adjudication, especially with the consent of the parties, does not violate Article III. Respondents offer no effective rebuttal to our position. Their constitutional argument, that the Commission's resolution of such counterclaims somehow offends a protected sphere of state sovereignty, abandons the rationale of the court of appeals,

is contrary to familiar and longstanding practice, and finds no support in the Constitution or in this Court's Article III jurisprudence.

1. Respondents argue first (Br. 6-16) that the Commodity Exchange Act (CEA) does not permit the Commission to entertain a broker's debit balance counterclaim that arises out of the same transaction as a customer's complaint for reparations under the Act. Respondents apparently would require that Congress expressly authorize such jurisdiction. No precedential support is cited for this unusual proposition, nor do respondents point to any legislative history suggesting that any Member of Congress took the position that the agency could not adjudicate such counterclaims and thereby fully resolve the dispute over the transaction.[1] Even if a clear indication of congressional intent is required, the legislative history of the CEA, which is discussed in our opening brief (at 19-21), indisputably demonstrates that Congress recognized and approved of the Commission's authority to adjudicate counterclaims.[2]

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[1]Respondents rely heavily on what they view as the unprecedented nature of the Commission's counterclaim jurisdiction. They fail to respond to our brief, however, where we pointed out (at 46 n.23) that agencies commonly resolve state law issues in the course of awarding reparations and restitution. In any event, regardless of the frequency of such adjudication by other agencies, Congress delegated to the CFTC the authority to fashion its own reparations program in the manner that the agency determines will best further its purposes. Respondents' observation (Br. 8) that the reparations forum was not intended "to resolv[e] all possible disputes between customers and registrants" or to serve as a collection service for brokers is beside the point: the Commission's counterclaim jurisdiction is carefully limited to debit balance claims arising out of the same transaction as a customer's own claim, and brokers may not invoke the Commission's jurisdiction in the absence of claims by their customers.

[2]Respondents discount this legislative history by suggesting (Br. 7, 9) that Congress, in acknowledging the Commission's jurisdiction over counterclaims, was referring only to those arising under the CEA. As we made clear in our opening brief (at 23), however, such counterclaims

Moreover, respondents' argument ignores the plain language of the statute, through which Congress conferred an exceedingly broad grant of rulemaking authority upon the CFTC. See Gov't Br. 18-19. There is nothing in the language of the Act to support the implied limitation on this delegation for which respondents contend. Compare *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. Nor, of course, is the Act subject to judicial amendment to avoid confronting constitutional questions. See, *e.g.*, *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948); *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926). The Commission, in exercising its legislatively delegated authority, has determined that administrative adjudication of counterclaims will best further the purposes of the Act. Respondents, without even a nod to the deference owed the agency's construction of its own statute, advance no persuasive reason for overcoming that deference in this case.

Respondents suggest, contrary to the Commission's experience, that jurisdiction over counterclaims is unimportant and will not further the purposes of the reparations program. Their contention (Br. 13) that only 60 cases involved counterclaims from 1980 to 1984 is manifestly erroneous. This figure referred only to cases still pending in 1984; it did not reflect the numerous cases that had been disposed of during that four-year period. Although published information is not available, we stand by our earlier representation (Br. 25) that debit balances arise routinely in

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almost never arise. Respondents do not directly dispute this. Rather, they rely (Br. 9 n.5) only on a proposed rule circulated for notice and comment before the Commission had any experience with the reparations program and on a Commission order issued in response to the decision below, which merely implements the precise holding of the court of appeals.

CFTC reparations proceedings and that counterclaims are filed in a significant portion of these cases. And as we have also made clear (Br. 26-27), invalidation of the Commission's counterclaim rule would seriously impair the usefulness of the reparations forum by deterring customers from bringing their actions before the agency, regardless of the actual number of cases in which formal counterclaims might eventually be raised.[3]

Respondents' argument (Br. 14-15) that the Commission's adjudication of counterclaims will disadvantage customers rests on their unsupported contention that the CFTC does not permit customers to raise state law defenses or counterclaims of their own, a contention that they have already twice unsuccessfully pressed in this Court. See *Schor* v. *ContiCommodity Services, Inc.*, cert. denied, No. 85-872 (Jan. 21, 1986); *Schor* v. *ContiCommodity Services, Inc.*, cert. denied, No. 84-1673 (June 17, 1985). As we explained in our responses to those cross-petitions, respondents' state law claims were not presented to the Commission; the Commission's regulations do permit a customer to raise state law defenses to a broker's counterclaims (see 17 C.F.R. 12.24 (1983)); and the Commission has never taken a position on whether a customer may assert his own state law counterclaims to a broker's counterclaim because that issue has never arisen in the history of the reparations program. There is accordingly no basis for respondents' argument that customers are discouraged from taking advantage of the reparations forum for fear

[3]Respondents' argument (Br. 14) that the Commission's counterclaim jurisdiction is unimportant because brokers may still file their debit balance claims in court ignores the fact that the efficiency and lower cost of the reparations forum make it attractive to brokers as well as to customers. In this very case, Conti voluntarily dismissed its federal court action in order to proceed before the Commission. See Gov't Br. 5-6.

that they will not be able to rely on state law where it would be appropriate to do so—an argument contradicted by the fact that many thousands of customer-initiated claims have already been adjudicated by the Commission (see Gov't Br. 24).

2. a. Respondents attempt to answer our argument that they consented to the Commission's adjudication of Conti's counterclaim merely by pointing (Br. 40-41) to their opposition to that adjudication before the reparations forum. They wholly fail to respond to our demonstration (Br. 5, 28-29; see J.A. 11-14, 17-20), however, that respondents affirmatively stated in the district court where Conti's debit balance claim was pending that they wished to see the entire dispute, including that claim, resolved before the Commission. It was not until after the ALJ issued his preliminary decision against respondents that they argued, for the first time, that the counterclaim could not be resolved in the reparations forum. Having succeeded in obtaining Conti's dismissal of its debit balance action following their representation that it would be adjudicated before the CFTC, respondents plainly are in no position to argue that they did not consent to the agency's decisionmaking authority. And, in any event, respondents' voluntary choice to file their claim before the Commission (rather than in court) with knowledge that the counterclaim would then be adjudicated in the same forum amply demonstrates their consent to that adjudication.[4]

[4]The doctrine of unconstitutional conditions, on which respondents rely (Br. 40-41 n.31), is irrelevant to this case. Respondents have not been denied a government benefit because they exercised a constitutional right. Rather, they had the option of seeking resolution of their controversy with Conti in an Article III forum or in the reparations forum. As we explained in our opening brief (at 29-32), nothing in the Constitution in general or Article III in particular requires that this choice be totally costless. Such a requirement would effectively render

b. Respondents also argue (Br. 38-40) that Article III prohibits the CFTC's adjudication of Conti's counterclaim even with their consent.[5] If accepted, this far-reaching proposition could invalidate on constitutional grounds numerous federal statutes and well-established adjudicatory procedures, such as the Federal Arbitration Act, the Magistrates Act, and reference to special masters and referees, which authorize non-Article III decisionmakers to resolve questions of state law. See Gov't Br. 33-37. Respondents attempt to brush these areas aside with the cursory observation (Br. 40) that "resort to these sorts of alternatives is [not] necessarily inconsistent with the expectations underlying the grant of federal power." But if parties may consent to the entry of orders enforceable in federal court in these contexts, it is scarcely possible to see why they should not be able to do so here as well.[6] In every case, Congress has

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all constitutional rights nonwaivable. Just last Term, of course, the Court upheld a considerably more burdensome consent to adjudication by a non-Article III tribunal. *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 22.

[5]In making this argument, respondents rely in large part on the doctrine that defects in subject matter jurisdiction are not waivable. We explained in our opening brief (at 38 n.19) why that rule is irrelevant here, and we cited precedents of this Court holding that Congress may condition the jurisdiction of federal courts on the consent of the parties. See also *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464, 467 (1945) (jurisdiction depended on state's consent; absence of jurisdiction could be raised for first time in this Court). Respondents offer no reply to our discussion.

[6]This is particularly so with respect to the Federal Arbitration Act, which overrides state laws that formerly made contractual arbitration clauses unenforceable. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984). If Congress may, on the basis of the consent of the parties, take general commercial disputes out of the state courts even though the states themselves had specified that they could only be resolved there, it surely may give litigants the option of proceeding in the reparations forum for the narrow range of claims at issue here, which the states have not historically confined to their own courts (and which may in fact be brought in federal court).

sanctioned the resolution of both federal and state law questions by decisionmakers who lack the protections of Article III, and it has made that resolution legally binding on the parties following a measure of judicial review.

Respondents offer no reason why decisions by the Commission in its reparations forum somehow derogate from state prerogatives in any greater degree than decisions by magistrates, arbitrators, or special masters. Indeed, the more searching judicial review of Commission decisions, the limitation of the Commission's jurisdiction to counterclaims arising out of the same set of facts as reparations claims, and the general lack of relevance of questions of state law to the Commission's decisions on counterclaims all suggest precisely the opposite. The constitutionality of the Commission's consensual reparations forum therefore follows directly from the constitutionality of these other dispute resolution mechanisms.

Finally, respondents assert (Br. 38) that our reliance on consent rests on the notion that Article III creates only personal rights. We plainly acknowledged in our opening brief (at 37-40), however, that Article III also responds to structural concerns, and we were careful to demonstrate why those concerns are not impaired by the Commission's adjudication of state law counterclaims with the consent of the parties.

3. The bulk of respondents' brief (at 16-38) is devoted to the remarkable proposition that Article III prevents Congress from establishing, under Article I, a tribunal that adjudicates any state-created cause of action, no matter how intimately related to federal rights.

a. Respondents' formalistic proposed distinction between an Article I tribunal's adjudication of a state-created cause of action and such a tribunal's determination of issues of state law (and thus of state-created rights) in the course of

adjudicating federally-created causes ignores the wide-ranging issues of state law involved in the latter types of determinations and their importance to the parties. For example, the Tax Court is an Article I court (I.R.C. § 7441). The Tax Court is routinely required to decide questions of state law, and to determine the rights of parties under state law, in reviewing the Commissioner's assertion of deficiencies in federal income, estate, and gift tax. State law, for example, may determine whether an individual is subject to transferee liability (I.R.C. § 6901), whether a decedent has an interest in property subject to estate tax (I.R.C. §§ 2031, 2033), whether a payment is includable in income as alimony (I.R.C. § 71(a) (Supp. II)), whether claims and expenses qualify for deduction against the gross estate (I.R.C. § 2053 (& Supp. II)), whether a bequest to a surviving spouse qualifies for the estate-tax marital deduction (I.R.C. § 2056 (& Supp. II)), and whether persons are single or married for purposes of income-tax filing requirements (I.R.C. § 1 (& Supp. II)). Thus, the Tax Court must regularly decide whether the transfer of property, or the creation of an interest in property, is a fraudulent conveyance under state law;[7] must determine individuals' rights under wills, partnership agreements, and insurance policies;[8] must decide whether a party under state law has enforceable rights against an estate, or whether fees paid by an executor are allowable expenses of administering the estate;[9] must

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[7] *E.g., Alonso* v. *Commissioner,* 78 T.C. 577, 582-583 (1982); *Scott* v. *Commissioner,* 70 T.C. 71, 79-84 (1978); *Lewis* v. *Commissioner,* 33 T.C. 215, 220-223 (1959).

[8] *E.g., Estate of Draper* v. *Commissioner,* 64 T.C. 23, 29-32 (1975); *Estate of Williams* v. *Commissioner,* 62 T.C. 400, 407-413 (1974); *Estate of Miller* v. *Commissioner,* 58 T.C. 699, 707-714 (1972); *Estate of Crawford* v. *Commissioner,* 46 T.C. 262, 269-271 (1966); *Estate of Hull* v. *Commissioner,* 38 T.C. 512, 521-522 (1962).

[9] *E.g., Estate of Baldwin* v. *Commissioner,* 59 T.C. 654, 657-659 (1973); *Estate of Lazar* v. *Commissioner,* 58 T.C. 543, 552-555 (1972).

determine whether a former spouse under state law has a legal obligation to pay alimony;[10] must determine the nature of an allowance paid under state law to a surviving spouse, or the effect of a beneficiary's disclaimer on the disposition of property under a will;[11] and must even decide whether state law would recognize a particular divorce as valid.[12] Even apart from the possible collateral estoppel effects of such determinations, they obviously affect substantial rights of the parties to the federal proceedings. It has, however, generally been regarded as properly respectful of state authority (rather than a denigration of that authority) for federal tribunals to do their best to conform their decisions to applicable rules of state substantive law.

In any event, respondents' contention that a different rule should apply to adjudication of state-created causes of action is directly contradictory to, and thus squarely foreclosed by, this Court's decision in *Southland Corp.* v. *Keating,* 465 U.S. 1 (1984). The question in that case was whether the federal Arbitration Act required a dispute between the parties to a franchise agreement to be submitted to arbitration pursuant to the agreement's arbitration clause. The underlying dispute between the parties clearly involved state-created causes of action, asserted in state court by the appellee franchisees, for alleged "fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law" by the appellant franchisor. 465 U.S. at 4. This Court held that the federal Act required the claims to be submitted to arbitration and

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[10] *E.g., Hoffman* v. *Commissioner,* 54 T.C. 1607, 1611-1613 (1970).

[11] *E.g., Estate of Rubinow* v. *Commissioner,* 75 T.C. 486, 488-492 (1980); *Estate of Swenson* v. *Commissioner,* 65 T.C. 243, 249-253 (1975).

[12] *E.g., Boyter* v. *Commissioner,* 74 T.C. 989, 994-1000 (1980).

pre-empted a state statutory provision construed by the state Supreme Court as preventing their arbitration and retaining them for adjudication in the state courts. This Court thus squarely held in *Southland* that Congress could, and did, require the adjudication of state-created causes of action by a non-Article III tribunal.

Indeed, essentially the same constitutional argument respondents here advance was made by the appellee franchisees in *Southland* in a portion of their brief in this Court (at 33-38) entitled "The Federal Arbitration Act Would Be Unconstitutional If Applied To Bar State Courts from Adjudicating Important State Rights for which Access to a Judicial Forum Is Guaranteed by the State Legislature." While the argument was made in a slightly different context and was articulated somewhat differently, it relied on Article III of the Constitution and this Court's then-recent decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), for basically the same constitutional theory respondents now urge. This Court's holding in *Southland*, therefore, necessarily rejected that constitutional claim.

As we shall now briefly show, this Court's rejection of that claim in *Southland* fully comports with the important role and purposes of Article III.

b. The tenure and salary provisions of Article III were intended to safeguard the role of the federal judiciary as an independent and co-equal branch of the federal government. See, *e.g.*, *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 13; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. at 57-60 (plurality opinion); *United States* v. *Will*, 449 U.S. 200, 217-218 (1980); Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts*

are Unconstitutional, 70 Geo. L.J. 297, 304 (1981) (emphasis in original (Article III protections concern "the separation of powers at the *federal* level"). In the court of appeals' view (now virtually abandoned by respondents), the CFTC's adjudication of counterclaims is constitutionally suspect because it threatens this independence. See 85-621 Pet. App. 33a. We demonstrated in our opening brief why this view is erroneous.

Northern Pipeline, on which respondents place primary reliance (Br. 27), is wholly irrelevant to what is now respondents' principal contention. In almost 70 pages of opinions in that case there is not a single reference to state prerogatives.[13] Instead, the plurality based its decision on the very threat to judicial independence that respondents virtually concede (Br. 34) is not present here. See, *e.g.*, 458 U.S. at 57-60, 64 & n.15, 68, 74, 83-84. And the Justices who concurred in the judgment reasoned that the Bankruptcy Act deprived litigants of their personal, waivable right to adjudication before an Article III judge, not that the Act impaired the powers of the States. See *id.* at 90-91. Respondents cites no case suggesting — contrary to the holding in *Southland*—that only those federal tribunals constituted under Article III may adjudicate state law claims under any circumstances.[14]

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[13]Indeed, while the plurality noted a number of institutional values served by Article III in addition to the separation of powers at the federal level, it did not list the furtherance of state interests among them. 458 U.S. at 59 n.10.

[14]Most of the cases on which respondents rely are plainly inapposite, for they rest on the undisputed—and irrelevant—proposition that the jurisdiction of Article III courts is limited to the cases and controversies set forth in Section 2 of that provision. The plurality in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), expressly disclaimed (*id.* at 549) any decision concerning "the extent to which Congress may * * * [assign adjudicatory tasks] to tribunals other than Article III courts." Rather, the parties and the plurality assumed (*id.* at 537 (footnote omitted)) that

The absence of judicial authority for respondents' position is hardly surprising given its corresponding lack of historical support. Respondents make much (Br. 18-22) of the controversy engendered by the Diversity Clause in the debates over ratification of the Constitution. None of the reasons advanced against the Clause, however, is relevant to the Commission's counterclaim rule. As Judge Friendly explained in *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 488-491 (1928), the Anti-Federalists gave five grounds for abolishing diversity jurisdiction: federal jurisdiction would be exclusive and therefore would deprive state courts of jurisdiction; state courts would somehow be absorbed into the federal government; federal law might be applied in favor of state law; litigation in the federal courts would be unduly expensive; and the state courts were adequate to meet the needs of the new nation. The first of these propositions is erroneous as a matter of law and the second as a matter of fact; the third was settled by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938); the fourth cuts in favor of the less expensive administrative tribunal; and the last is contrary to the judgment of Congress and the Commission in establishing and implementing the reparations forum.[15]

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a question of state law presented for decision "solely by reason of the diverse citizenship of the litigants" must be decided in conformity with Article III. That proposition, however, is quite beside the point here, where the state law issue is presented not because of the parties' citizenship but because of its intimate relation to a federally created cause of action. Other cases on which respondents rely, such as *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941), similarly are limited to situations in which diversity of citizenship is the only basis for federal adjudication. See also *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 650 (1949) (Frankfurter, J., dissenting) (federal diversity jurisdiction "has no relation to any substantive rights created by Congress").

[15]To the extent that respondents rely on the impartiality and expertise of federal judges, those concerns are effectively dispelled by the

c. Even if Article III were thought to place limitations on federal adjudication of state causes of action unrelated to federal rights (but see *Southland Corp.* v. *Keating, supra*), those limitations would be wholly irrelevant here. The Commission adjudicates only those debit balance counterclaims that arise out of the same transaction or occurrence as a customer's reparations claim. As such, these would be within a federal court's ancillary or pendent jurisdiction. See Gov't Br. 42; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) (constitutional authority to adjudicate a state law claim exists whenever that claim "derive[s] from a common nucleus of operative fact" with a federal claim). Just as federal courts may adjudicate state law issues in conjunction with federal claims in the absence of diversity, so may administrative agencies. See *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943) (upholding administrative resolution of state law claim ancillary to federal dispute).

Respondents contest the relevance of ancillary jurisdiction only by asserting (Br. 29-30 n.24) that such jurisdiction advances the purposes of Article III when exercised by courts but impedes them when exercised by administrative tribunals. The encroachment, as respondents would have it, on state prerogatives is the same in either case: a federal tribunal is adjudicating state law issues in circumstances outside the limited grant of federal diversity jurisdiction. And, as we have explained (Br. 24-27), the exercise of ancillary jurisdiction in this context furthers the purposes behind establishment of the tribunal just as it does for courts. There is surely no basis in Article III for depriving administrative tribunals of this limited, but necessary, supplement to their adjudicatory authority.

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consensual nature of the Commission's authority. See Gov't Br. 28-41. Respondents have not explained how such consensual adjudication could possibly impair the interests of the States.

In addition to misapprehending the scope and purpose of Article III, respondents ignore Congress's powers under Article I. While Article III provides the authority for judicial determination of state law causes of action in the limited circumstances permitted by the Diversity Clause and doctrines of ancillary and pendent jurisdiction, it is also true that, in Article I, the States authorized the federal government to exercise plenary authority over areas such as interstate commerce. See generally, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981). Article III may limit the manner in which that authority is exercised in order to safeguard the rights of individuals and the role of the federal judiciary as a co-equal branch of the federal government. See *Northern Pipeline*, 458 U.S. at 57-60, 73-76 (plurality opinion). Respondents completely fail, however, to offer support for the proposition that Article III extends further to alter the federal-state balance established by Article I. In particular, respondents have failed to advance any reason for erecting a constitutional barrier against Congress's delegation of authority to the Commission to adjudicate counterclaims as an incident to Congress's power to establish a forum for adjudicating the right to reparations that it enacted. See *id.* at 83-84 (plurality opinion).

d. Even if Article III were thought to impose some limitation upon the exercise of Congress's Article I powers for the purpose of preserving sovereign prerogatives of the States, the CFTC's adjudication of debit balance counterclaims remains constitutionally unobjectionable. Agency adherence to state law cannot itself constitute an affront to state sovereignty. To the contrary, it demonstrates respect for that sovereignty. And the States themselves, of course, are not parties to the Commission's reparations proceedings. This case therefore raises no question concerning any possible governmental immunity that they might possess from

suit in or orders entered by an Article I tribunal. Compare *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985).

Moreover, as we explained in our opening brief (at 47-48), the Commission has not historically been required to adjudicate contested issues of state law. Rather, the agency's decision on a broker's counterclaim typically follows inexorably from its decision on the customer's federal law claim for reparations, and in particular, from its conclusion whether the broker committed a violation of the CEA that caused the customer's debit balance.[16] Accordingly, there is no ground for supposing that the Commission will misinterpret or misapply state law (and even if issues of state law did routinely arise in reparations proceedings, they would of course be reviewable de novo in federal court).

We also pointed out in our opening brief (at 47) that the Commission could preempt state contract laws governing debit balances, and that any affront to the dignity of the States that might somehow accompany adjudication of debit balance counterclaims surely would be less than that entailed by such preemption. Ignoring the Commission's own authority to preempt state law, respondents reply only by noting (Br. 36) that Congress itself must act in conformity with the Presentment Clause. That much of course is true, but it fails to blunt the force of our argument. Our point is simply that it would be anomalous to read Article III to protect state rights in a manner that would require the Commission to displace state law rather than to apply it faithfully.

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[16]See, *e.g.*, *Hand* v. *Paine Webber Jackson & Curtis, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,739, at 31,099 (Sept. 30, 1985); *Plunk* v. *Shearson/American Express, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,489, at 30,157 (Jan. 25, 1985), aff'd mem., No. 84-R29 (CFTC Aug. 29, 1985); *Sherwood* v. *Madda Trading Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728, at 23,020 n.19 (Jan. 5, 1979).

Finally, if respondents' concern is that the availability of the reparations forum will significantly impair the viability of the state courts, that fear is grossly overstated. Paying "practical attention to substance rather than [placing] doctrinaire reliance on formal categories" (*Thomas*, slip op. 17), it must be clear beyond any reasonable doubt that the Commission's consensual adjudication of this narrow range of counterclaims—which could be brought in federal court in any event—cannot possibly threaten to undermine state judicial systems. The state forum remains available (see *Misasi* v. *Paine, Webber, Jackson & Curtis, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. ¶ 21,351 (Dec. 30, 1981)), but even where it is used, the state court, like the Commission, must subordinate questions of state law to the requirements of the federal CEA. There is simply no possibility that the parties' option of going to the reparations forum for resolution of the extremely circumscribed class of claims raised in the context of the federally regulated commodities industry will jeopardize the core function of state courts, which is, of course, to develop, interpret, and apply state law.

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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